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17 50

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK.

BY
SAMUEL JONES AND JAMES C. SPENCER,
REPORTERS OF THE COURT.

NEW YORK SUPERIOR COURT REPORTS,
VOL. XLIII.

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JUDGES
OF THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK
DURING THE TIME OF THIS VOLUME OF REPORTS.

WILLIAM E. CURTIS,
Chief Justice.
JOHN SEDGWICK,
HOOPER C. VAN VORST,
GILBERT M. SPEIR,
CHARLES F. SANFORD,
JOHN J. FREEDMAN,
Justices.

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CASES ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK
AT GENERAL TERM.

**HORACE B. CLAFLIN, ET AL., PLAINTIFFS AND
RESPONDENTS, v. HENRY J. MEYER, DEFEND-
ANT AND APPELLANT.**

WAREHOUSEMEN, THEIR DUTIES AND RESPONSIBILITIES.

**PRESUMPTION OF NEGLIGENCE ARISING FROM NON-DELIVERY
OF GOODS.**

The rule is well settled that upon proof of the non-delivery of goods stored with a warehouseman, a presumption of negligence arises, and the burden of proof lies with the warehouseman to account for the loss, and to show that it was not caused by want of proper care and diligence on his part. (See many cases cited by court.)

A larceny of goods occurring in consequence of neglect of warehouseman constitutes a conversion by virtue of a wrongful taking, and no demand by the owner is necessary after notification to warehouseman of loss of the goods.

The fact that the goods were stolen from a U. S. bonded warehouse, and were bonded goods, does not change or affect defendant's liability (*Schwerin v. McKee*, 51 N. Y. 180).

Appellant's points.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

Appeal by defendant from a judgment for \$16,523.55 in favor of plaintiffs, entered upon the report of three referees.

The action was brought to recover damages for a conversion of goods by a warehouseman.

The answer was that the goods had been stolen without fault on the part of defendant.

It was admitted that the warehouse in question was a United States bonded warehouse. On that proof, and the admission that the defendants were unable to deliver the goods in question to the plaintiffs, the plaintiffs rested their case.

The three referees, at the request, by the consent, and in the presence of both the attorneys and counsel of the respective parties, and of the defendant in person, went upon and viewed the warehouse of the defendant in which the goods in question had been stored, and upon the proof and such examination they found, as matter of fact, that the goods in question had been stored by plaintiffs with defendant; that between November 11 and 13, 1871, the goods were stolen and carried away; that the defendant was thereby unable to deliver the same to the plaintiffs; and that the defendant, during the time the said goods were in his warehouse, did not use that care in keeping and protecting the same that an ordinarily prudent man would under the circumstances have exercised, and that defendants were guilty of negligence in not using such care. The referees also found that the goods were stolen without the knowledge, consent, and connivance of the defendant or any of his servants.

R. W. Townsend, attorney, and *A. R. Dyett*, of

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counsel for appellant, among other things, urged : I.—The defendant, being a warehouseman, was liable only for ordinary care, which is that care that an ordinary prudent man would under the same circumstances have exercised in relation to the protection and safe keeping of his own property, and the referees so defined it ; and he is not liable for goods stolen from his warehouse unless the theft be occasioned by his own gross negligence (*Schmidt v. Blood*, 9 *Wend.* 268). 2. Negligence of whatever degree is an omission to do what ought to be done (*Shearm. and Redf. Neg.* §§ 2–6 ; 5 *Denio*, 255, 266 ; 4 *N. Y.* 349 ; 1 *Duer*, 571, 573). And some proof of such negligence must always be given by the plaintiff in every case, except in cases against common carriers of goods, who are liable apart from actual negligence, and carriers of passengers, against whom, from motives of public policy, a presumption of negligence is indulged (*Wilde v. H. R. Co.*, 24 *N. Y.* 430 ; *Leroy v. N. Y. Central Railroad Co.*, 22 *Id.* 514 ; *Robbins v. Mount*, 4 *Robertson*, 553 ; *Moore v. Goedel*, 7 *Bosw.* 591 ; 534 *N. Y.* 527 ; *S. C.*, *Eaken v. Brown*, 1 *E. D. Smith*, 36, 44 ; *Waldron v. R. & S. R. R. Co.*, 8 *Barb.* 395 ; *Ross v. Fedden*, 41 *Law Journal* [*N. S.*] *Q. B.* 270 ; *McGinty v. The Mayor, &c.*, 5 *Duer*, 674). It is true that in this case, a failure by the defendant on demand to deliver the goods, *prima facie*, entitled the plaintiff to recover, but when the defendant proved, as he did, that the goods were stolen without the consent, knowledge or connivance of himself or any of his servants, as the referees found, the *onus probandi* was cast upon the plaintiff to prove negligence on his part (*Arent v. Squire*, 1 *Daly*, 347, at page 350, *et seq.* ; *Schmidt v. Blood*, 9 *Wend.* 268 ; *Foot v. Storrs*, 2 *Barb.* 326 ; *Bush v. Miller*, 13 *Barb.* 489 ; *Story on Bailments*, § 454, and cases there cited ; 2 *Parsons on Contracts*, 143 ; 6 *Roberts*. 419 ; 3 *Barb.* 383 ; 13 *Barb.* 489 ; 9 *How.*

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327 ; 20 *Barb.* 252 ; 22 *How.* 141). 3. There was no proof of any negligence on the part of the defendant, and although the referees found that he did not exercise the care that an ordinary prudent man would under the same circumstances, have exercised in relation to the protection and safe keeping of his property, there was not a *scintilla* of proof before the referees as to what that care was—in other words, as to what ordinary prudent men would have done under the same circumstances in reference to the protection and safe keeping of their own property. There was no proof that any specific act or thing which ordinary prudent men—or any other men—for that matter—did, was omitted by the defendant. The referees, therefore, had no standard of comparison. 4. Besides, to charge a party with negligence, the acts or precautions omitted, forming the basis of liability, must be such as if done or taken, would probably have prevented the occurrence which occasioned the injury. And there must be some proof of this, unless the common experience of mankind will suffice to reach that conclusion (*Daniel v. Metropolitan Rl., Law Rep. Com. Pleas*, 1867–1868, vol. 3 ; *Cochran v. Dinsmore*, 49 *N. Y.* 249 ; *The Russ. M. Co. v. The N. H. R. R. Co.*, 50 *Id.* 121). These elements are all wanting in this case. 5. The defendant, it must be remembered, is not a carrier of passengers, who is bound to adopt all and every known means to secure the safety of his passengers, but a warehouseman, liable only for neglect to use such means as ordinarily prudent men would, to protect their own goods in similar circumstances. Even a carrier of passengers, however, must be shown to know of the omitted means, precautions, or they must be so generally used, as to charge him with negligence in not discovering and using them (*Steinwig v. Erie R. R. Co.*, 43 *N. Y.* 122 ; *Bowen v. N. Y. C. R. R. Co.*, 18 *Id.* 408 ; *Field v. Same*, 32 *Id.* 399 ; *Shearman and Redfield on*

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Negligence, § 266 (a) ; *Hegeman v. West R. R. Co.*, 13 N. Y. 9).

II. The referees erred in allowing the duties, amounting to \$4,707.83, as part of the value of the goods. 1. The defendants have never paid or been asked to pay those duties. 2. The condition of the bond that they gave for the duties is, that the duties should be paid upon the withdrawal of the goods from the warehouse by the plaintiffs for consumption. The felonious taking of the goods from the warehouse by thieves, without any complicity on the part of the plaintiffs, can hardly be said to be a withdrawal of the goods within the meaning of the act of Congress. The defendant, therefore, was not liable for these duties. 3. But if the defendant is liable to the plaintiffs for their property in these goods, he is equally liable to the United States for its special property in the goods, which is their lien for the amount of these duties, and the plaintiffs not having paid them, if the defendant pays them the money, he is unprotected from the claim of the United States against him for them, in case the plaintiffs do not pay them to the government. See form of defendant's bond as warehouseman to U. S., general regulation of custom and navigation laws of U. S. 1874, p. 240 ; also form of plaintiff's bond to pay duties, *Id.* 262, Art. 598. And as to lien of U. S. for duties, *Id.* 213, Art. 466 ; necessity of permit, &c., *Id.* 368 ; Art. 774, and p. 268, Art. 612, to p. 271, U. S. revised statutes, sections 249, 2,652, 4,792, and section 2,960. Although the duties be a personal debt to the U. S. they cannot be collected by action until the goods be delivered to the importer, nor at all events until after the three years specified in the bond, *supra*, and which had not expired when this action was brought. 4. As already stated goods in bonded warehouses are by the act of Congress in the joint custody of the warehouseman and the government, but

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these goods in fact, if stolen during the night or on Sunday, were in the sole charge and custody of the government. In either event the government is liable to the plaintiffs; in the one case jointly with the defendant, and in the other solely, and cannot recover from them the duties on the goods while unable for such a reason to deliver them. The plaintiffs it must be remembered are totally without fault in the premises. The expression in the act of Congress that goods in bonded warehouses are "at the risk" of the importer, does not cover negligence as one of those risks (*Schwerin v. McKie*, 51 *N. Y.* 180; *Davenport v. Ruckman*, 37 *Id.* at p. 574; *Colegrove v. N. Y. & H. R. R. Co.*, 20 *Id.* 492). Nor does it mean that they risk anything more in any event than the loss of the goods. To illustrate: if goods be carried at the risk of the owner, actual negligence of the carrier is not included, but he is liable for want of ordinary care—the precise liability of the warehouseman (29 *Barb.* 132; 7 *Hill*, 533; 14 *Barb.* 524). In such a case the owner is not liable to pay freight. Indeed, the owner is not liable for freight if the goods be lost by any cause.

III. This action is for a breach of the defendant's agreement to deliver the goods, and not for negligence. It is the defendant who sets up, in substance, that the goods were stolen without his fault. It was admitted on the trial as well as shown by the regulations, *supra*, that the plaintiffs had no right to receive the goods from the defendant without a custom-house permit, and after the duties were paid, and they had never paid those duties, nor produced a permit. This is fatal to the right to recover. If the want of a permit could be gotten over, the objection that they had not paid the duties, would be fatal, for this reason: the plaintiffs had no right to receive the goods from the defendant, nor had he any right, nor was it his duty, to deliver the goods to them. Until the plaintiff

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paid the duties, the United States had a lien upon them for the amount of them, notwithstanding the bond, which was an additional security, and as the plaintiffs have sued for non-delivery, and not for negligence, whereby they suffered damages to the amount of their property in the goods, they must stand or fall by their complaint (*Barnes v. Quigley*, 59 *N. Y.* 265; *Graham v. Reed*, 57 *Id.* 681; *Dudley v. Scranton*, *Id.* 424).

Arnoux, Ritch & Woodford, attorneys, and *William Henry Arnoux*, of counsel, for respondents.

BY THE COURT.—FREEDMAN, J.—It may now be deemed settled that upon proof of the non-delivery of the goods stored a presumption of negligence arises, and the burden of proof is thereupon cast upon the warehouseman to account fully for the loss and to show that the loss, however it may have occurred, was not caused by any want of proper care and diligence on his part (*Coleman v. Livingston*, 36 *N. Y. Superior C.* [4 *J. & S.*] 37; reargued, *Id.* 231; and affirmed, 56 *N. Y.* 658; *Burnell v. N. Y. Central R. R. Co.*, 45 *Id.* 184; *Fairfax v. N. Y. Central & Hudson R. R. Co.*, in the court of appeals, not yet reported).

Under these decisions, and upon the evidence and a view of the premises, the referees were justified in finding that the defendant had not exercised the care that a prudent man would under the same circumstances have exercised in relation to the protection and safe keeping of his own property, and that in consequence of such neglect plaintiffs' goods were stolen and carried away.

After the defendant himself had notified the plaintiffs of the theft of the goods, a formal demand upon him for the goods would have been an idle ceremony. The larceny occurring in consequence of defendant's

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neglect constituted a conversion by virtue of a wrongful taking, and no subsequent demand was necessary after defendant himself had notified the plaintiffs of the loss of the goods.

The fact that defendant's warehouse was bonded to the United States and that the goods stolen were bonded goods, does not change defendant's liability. In *Schwerin v. McKie*, 51 *N. Y.* 180, the court of appeals held that the provision of the act of Congress of 1852 (10 *U. S. Stat. at L.* 270), which provides that goods deposited in a private bounded warehouse authorized by that act, shall be at the exclusive risk of the owner or importer, was intended solely for the benefit of the government, and does not relieve the warehouse-keeper from the duty of exercising ordinary care and prudence, nor from the liabilities of other warehousemen to their patrons.

The defendant admitted that the market value in the city of New York of the goods at the time of their loss and at the commencement of the action was \$12,084.83. The referees therefore very properly gave judgment for that amount and interest. The fact that the duties on the goods had not yet been paid, cannot diminish this liability. Under the laws of the United States the plaintiffs are liable for the duties. They gave a bond for their payment, and the withdrawal of the goods from the warehouse makes them liable to pay the duty, no matter how, where, or by whom the goods were withdrawn (9 *U. S. Stat. at L.* 53).

The exceptions to the exclusion of evidence are clearly untenable.

The judgment should be affirmed with costs.

SEDGWICK and SPEIR, JJ., concurred.

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LOUISA B. COOPER AND OTHERS, PLAINTIFFS, v.
REUBEN SMITH, JAMES PLATT, AND OTH-
ERS, DEFENDANTS.

Verdict directed for the defendants, plaintiffs' exceptions to be heard at general term in the first instance (See report of same case on same ruling, 39 *N. Y. Super. Ct.* [7 *J. & S.*] 452).

The facts presented on the second trial of the case not differing materially from those presented on the former appeal, the decision on that appeal should have been followed on the second trial as the law. If there was error in the decision of the general term, the remedy was either by appeal to court of appeals or by motion for a re-argument.

Held, that upon neither of the defenses in the case was the evidence so convincing or conclusive as to deprive the plaintiff of his right to have the facts considered by a jury.

Before SEDGWICK and FREEDMAN, JJ.

Decided June 25, 1877.

The action was to recover possession of a lot of land. It was originally commenced by Sarah L. Hudson, as plaintiff, and on her death Louisa B. Cooper was substituted as plaintiff.

The issues were tried once before and a verdict directed for the defendants, plaintiffs' exceptions to be heard at general term in the first instance.

The general term sustained plaintiffs' exceptions and ordered a new trial (See report in 39 *N. Y. Superior Ct.* [7 *J. & S.*] 452, where the facts appear with sufficient clearness).

On the second trial the evidence was substantially the same as had been given on the first trial. The only addition was the deed by Mrs. Berrand to Platt.

The court directed a verdict for the defendants, and ordered plaintiffs' exceptions to be heard at general

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term in the first instance. This ruling was made in consequence of defendant's claim, that in the opinion delivered at general term after the first trial, there was a misapprehension as to a material fact.

John Townshend, for plaintiffs.

H. E. Tallmadge, for defendants.

BY THE COURT.—FREEDMAN, J.—The case has been twice tried. Upon the first trial, the plaintiff read in evidence the deed to Mrs. Watson, the judgment roll in the suit against Berrand and others, the execution and sheriff's deed, and that defendant Smith was in possession under defendant Platt, and rested. Defendants then gave in evidence that Mrs. Lotta was in possession of the premises, from 1855, until her death in 1864, and the deed by Mrs. Watson to Yates, Porterfield & Wells, and rested. Plaintiffs then proved by Porterfield and Wells, that the said deed was given only to secure a loan made to Mrs. Watson, and that the loan had been repaid.

Defendants in rebuttal showed that the repayment of the said loan was made by Mrs. Berrand, with her own money.

Both parties rested, and the court directed a verdict for the defendants subject to the plaintiffs' exceptions to be heard in the first instance at general term.

In sustaining plaintiffs' exceptions and ordering a new trial (39 *N. Y. Superior Ct.* 452), the general term, as the case then stood, expressly decided that the judgment of the supreme court in favor of Sarah Louisa Hudson, and against Isabella Berrand and others, involving, as it did, the whole question of Mrs. Watson's title, as well as the whole question of the title of the defendants in that action, was an effectual estoppel by record against Mrs. Berrand, shutting out the defense set up in her answer to the present action,

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and that consequently the direction of a verdict in favor of the defendants was error. Part of such defense consisted of a claim of right of possession under and by virtue of the payment made by her to Yates, Porterfield & Wells. In view of the point thus decided upon the facts before the court, the error occurring in the reasoning of the learned chief justice, who delivered the opinion, referring to the payment as having been made by Mrs. Berrand on behalf of Mrs. Lotta, instead of with her own money, is quite unimportant so far as it concerns only Mrs. Berrand and her co-defendants in the supreme court action. However the fact in that regard may have been, Mrs. Berrand was bound to litigate it in the first action, if she desired to litigate it at all. But even if it were otherwise, the remedy for the correction of the alleged error was either by motion for reargument or by appeal to the court of appeals. At all events, as the facts presented on the second trial did not, so far as they affect Mrs. Berrand or her legal representatives, differ materially from those presented on the former appeal, the decision that had already been made should have been followed as the law of the court. This being so, the plaintiff was entitled to the direction of a verdict against the administrator of the estate of Isabella Berrand, deceased.

The decision by the general term simply established, however, that by reason of the estoppel, there was error in directing a verdict in favor of the parties estopped, and that such error necessitated a new trial, as against all the defendants. True, the general term did not say so in express language, but that was the decision. How, then, does the case stand now? Neither Yates, Porterfield & Wells, nor Platt and Smith, were parties to the supreme court action, and if Platt has any valid claim to possession, it attached prior to the commencement of that action. His claim

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is founded upon a deed from Mrs. Berrand to himself, bearing date September 7, 1868, and he claims to have been in actual possession since that time, while the action by Sarah Louisa Hudson was not commenced until June, 1869. He therefore insists that even if said deed be insufficient to give him a good title in fee simple to the whole of the premises in question, it is at least sufficient to confer upon him all the rights of a mortgagee in possession; Smith is his tenant and as such his right to possession is, for the purposes of this case, identical with that of Platt. Under these circumstances, the parties whose joinder was omitted in the supreme court action cannot be held estopped by the judgment in that suit from now showing the true state of affairs; and in particular Platt is not estopped from showing, if he can, that under the deed from Mrs. Berrand he acquired at least the interest which Mrs. Berrand possessed in her own right, if, by virtue of her payment to Yates, Porterfield & Wells, she became a mortgagee in possession.

But upon neither of these defenses was the evidence so convincing that the plaintiff could be deprived of his right of going to the jury thereon.

As to the first it appeared without explanation that though the deed to Platt was dated September 7, 1868, it was not acknowledged or recorded until June, 1873. It also appeared that the said instrument was one more in the nature of a contract to convey than an actual conveyance, for it provided in terms that upon receipt of the consideration therein mentioned Mrs. Berrand should execute, acknowledge and deliver a proper and sufficient deed containing a general warranty and the usual full covenants for the conveying and assigning the fee simple of the said premises free from all incumbrances. No such warranty deed appears to have ever been executed.

Upon these and other circumstances that either ap-

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peared in evidence, or which the evidence failed to disclose, but which do not require special allusion at present, the plaintiff might have fairly argued, that Platt was not in point of fact a *bona fide* purchaser prior to, or without notice of the supreme court action.

As to the second, it was upon the whole evidence, and especially in view of the absence of any written memorandum by Yates, Porterfield & Wells, a question of fact for the jury whether Mrs. Berrand's payment to that firm was made so as to defeat the title held by them conditionally, or upon condition that such title should be kept alive and assigned.

Both defenses of Platt and Smith should have been submitted to the jury under proper instructions, and it was error to direct a verdict in their favor.

Plaintiffs' exceptions should be sustained as against all the defendants and the verdict should be set aside and a new trial ordered with costs to plaintiff to abide the event.

SEDGWICK, J., concurred.

ADELAIDE M. DE LAVALETTE AND CLARISSA
KNIGHT, PLAINTIFFS AND APPELLANTS, v.
JAMES E. SHAW AND OTHERS, DEFENDANTS
AND RESPONDENTS.

EQUITY.

In equity, action will lie to recover interests in property, where parties have obtained the legal title to the same by a series of fraudulent and unconscientious acts and dealings.

Where one, by a series of such acts, and by collusion with others, has placed a party in a situation of embarrassment for his own advantage, and then availed himself of the opportunity to obtain the

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property of that party, by a purchase or transfer through other parties with whom he is in collusion, at a sacrifice, he can be called to account in an equitable action.

A court of equity could and should afford relief against such fraudulent action, although no false statements appear to have been made in the premises.

In this case, however (the general facts appearing in the opinion of the court), it was held that the evidence fell far short of establishing such a case.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

Appeal by plaintiffs from judgment entered upon report of referee.

Horace Andrews, attorney, and *Albert Stickney*, of counsel, for plaintiffs.

Paddock & Cannon, attorneys, and *F. A. Paddock*, of counsel, for defendants.

BY THE COURT.—FREEDMAN, J.—The action, as brought, is based on the theory that the defendant Shaw, by collusion with different parties, placed the plaintiffs in a situation of embarrassment for his own advantage, and that, after having succeeded in this, he availed himself of the opportunity to deprive the plaintiffs of their property. These matters, if established by competent proof, would constitute a fraud against which a court of equity could afford relief, for false statements of matters of fact are not necessary. But the evidence falls short of making out such a case.

For three years prior to October, 1869, the defendant, Shaw, assisted the plaintiff, De Lavalette, as but few prudent business men would have done.

In December, 1866, he leased to her the Reunion Hotel, and sold her the furniture therein at the sum of

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\$28,500, without receiving one dollar in money. He contented himself with taking a chattel mortgage of \$23,500 upon the furniture thus sold, which is conceded to have been worth the price asked, and another chattel mortgage of \$5,000 upon the furniture and fixtures she then had in the De Laneau House, and which, together with her leasehold interest in the premises, were then already incumbered by a prior mortgage of \$3,000.

When the holder of the last-named mortgage pressed for payment, Shaw, at the solicitation of De Lavalette, in February, 1867, advanced the amount, and took an assignment of it.

During the next twelve months, he advanced her the further sum of \$7,382.85, to secure which he took (1) her bond secured by a mortgage on two lots in the rear of the De Laneau House, which had been bought by her for \$17,000, and on which a purchase money mortgage of \$14,000 then still rested, and (2) a mortgage on her leasehold interest in the De Laneau House, which was already incumbered as above stated.

In May, 1869, when, on the ground that De Lavalette had assigned her lease to Clarissa Knight, and transferred to her the title to the furniture in the De Laneau House, the owners of the fee refused to renew the lease of said house, except on condition that Shaw should become surety for the rent, Shaw, at the solicitation of De Lavalette, did become such surety for the plaintiffs for the term of five years, then ensuing. Shortly thereafter, the plaintiffs allowed several months' rent to accumulate and to remain unpaid, which default induced the owners of the fee to commence proceedings for the recovery of the possession of the premises. These proceedings had been prosecuted to a termination, and the owners of the fee had obtained judgment for the possession, when, in October, 1869, De Lavalette again applied to Shaw for a

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further loan, with which to pay the rent then in arrear and exceeding the sum of \$2,000.

There is nothing in the evidence tending to show that, up to this time, Shaw had not been as good a friend to the plaintiffs as they could desire to have for business purposes, but now he refused to loan any more. He declined to extend any further assistance to the plaintiffs. He offered, however, to loan the money to Mr. Childs, with whom De Lavalette was negotiating about a sale of an interest in the De Laneau hotel business, provided he, Childs, would take an assignment of the lease, and complete his negotiation with De Lavalette, but Childs declined.

Shaw then said that if plaintiffs chose to assign the lease to Chandler, he would lend him the money, but he would not do so, unless plaintiffs made an unconditional assignment to him, and this plaintiffs consented to do and did do. There can hardly be a doubt that Shaw intended that the assignment should be absolute not only in form, but in fact, and that the plaintiffs so understood it, for they had the assistance of counsel in this transaction and acted upon his advice. Notwithstanding such assignment they could have hope, but to be dispossessed would have been immediate ruin. Perhaps they supposed that thereafter they would find it comparatively just as easy to get along with Shaw as it had been in the past. But whatever their motives may have been, it is sufficient, for the purposes of this appeal, that there is no evidence tending to show that Shaw, by unfair means, induced them to do so.

But even if it be deemed that the assignment of the lease to Chandler was intended as a security merely, and that thereby Chandler, or the defendant Shaw, supposing Chandler to represent Shaw, became vested with no other or higher title than that of a mortgagee in possession, plaintiffs are in no better position, be-

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cause, by virtue of the subsequent purchase of the plaintiff's leasehold interest at the foreclosure sale, Shaw became the absolute owner, irrespective of the assignment and by a paramount title, and thereafter had a perfect right to make such terms with plaintiffs or with third persons desirous of purchasing, as were satisfactory to him.

What followed the assignment to Chandler is fully set forth in the findings of the referee, and these in turn are fully supported by the evidence. True, eventually the plaintiffs lost everything they had, but such loss was the result of lawful proceedings and the direct and natural consequence of their inability to meet their engagements, and not the consequence of any wrongful act on the part of Shaw or any of his co-defendants, and the evidence shows pretty plainly, even outside of the oral statements of witnesses, that such inability to meet their engagements arose from the fact that ever since 1866 De Lavalette had been doing a losing business. The testimony also shows that after the assignment to Chandler, Shaw for some time continued to give to plaintiffs, as he had done before, his assistance in a number of negotiations set on foot by De Lavalette for the purpose of effecting a sale of an interest in the hotel business of the De Laneau House, or Ashburton House as it was then called, and that after plaintiffs had even lost all legal claim upon Shaw, an arrangement was made finally consummated with third parties under which not only Shaw was secured, but the plaintiffs also were benefited, and that they accepted such benefit.

Now the terms imposed by Shaw on this final settlement may have been harsh, but again the plaintiffs had legal advice; the papers were prepared and executed and the arrangement completed with knowledge of every fact involved, and the plaintiffs were satisfied with the arrangement.

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Upon the whole case I fail to perceive that Shaw did any thing towards securing that to which he was honestly and fairly entitled, which in law or equity he had no right to do. I have read the evidence with care and am satisfied that the findings of fact, as made by the referee, are sufficiently sustained by evidence, and that they in turn sustain the conclusions drawn from them.

There being no error, and the exceptions to the exclusion of testimony being clearly untenable, the judgment should be affirmed with costs.

SEDGWICK and SPEIR, JJ., concurred.

THOMAS E. FAIRFAX, PLAINTIFF AND RESPOND-
ENT, v. THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY,
DEFENDANT AND APPELLANT.

WAREHOUSEMAN.

DUTIES AND RESPONSIBILITIES.

The non-delivery of property on demand raises a presumption of negligence, which the warehouseman is bound to remove by proof showing that *sufficient ordinary care* has been bestowed by him upon the property, and to establish *such care* the proof should show *affirmatively* that the loss, however it may have occurred, was not caused by want of proper care and diligence on his part. If the proof comes fully up to this requirement, the question of negligence becomes a question of law, and may be determined as such.

But if, in such case, the fair and legitimate inference from the evidence is favorable to plaintiff's cause of action, or they present a case where reasonable minds might differ as to the inference to be drawn from the evidence, the question is one of

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fact, and must be determined as such (See cases cited in the opinion of the court; also *Claffin v. Meyer*, 1, *ante*, where this subject is fully discussed).

Held, that this case was a proper one for the consideration of the jury as a question of fact.

Before SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

This case comes before the court on the defendant's appeal from a judgment entered on a verdict and from an order denying a motion for a new trial.

The complaint alleges the receipt by the defendant as a common carrier of the plaintiff's portmanteau on October 8, 1870, and the defendant's failure to deliver it.

The amended answer admits that the defendant is a common carrier, the receipt of the portmanteau, its carriage to New York, and alleges its loss there without fault or neglect of the defendant.

The answer then sets up that the carriage of the portmanteau was obtained from the defendant by fraudulent misrepresentations made by the plaintiff's agents, to the effect that the plaintiff had a ticket entitling him to be carried over defendant's road, whereas the plaintiff did not, in fact, travel over defendant's road.

The action was first tried in 1874, when the plaintiff had a verdict. The judgment entered was reversed and a new trial ordered (See 5 *J. & S.* 516).

On the second trial a verdict was directed for defendant. The plaintiff appealed, and the judgment was affirmed (See 8 *J. & S.* 128).

The plaintiff then appealed to the court of appeals, where the judgment below was reversed and a new trial ordered.

On the third trial the plaintiff had a verdict; and from the judgment entered thereon, and from the order

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denying motion for new trial on the minutes the defendant appealed.

Frank Loomis, for appellant.

Stickney & Shepard, for respondent.

BY THE COURT.—FREEDMAN, J.—Upon substantially the same facts as those appearing upon the last trial the court of appeals held that plaintiff's portmanteau was taken in charge by the defendant and transported to New York and there deposited by it in its baggage-room; that the defendant *thus* incurred the responsibility of a warehouseman, at least; and that upon the evidence the question of defendants' negligence was one of fact which should have been submitted to the jury. If there is any material difference, it is in my judgment in favor of plaintiff's position, for it now appears for the first time upon defendant's own showing that there was an arrangement between defendant's company and the Grand Trunk Railway, under which the latter was authorized to sell tickets and check baggage over defendant's road, and that the defendant depended on the agent of the Grand Trunk Railway at Montreal for properly checking the baggage.

It is true that prior to the last trial the answer was amended by adding an allegation to the effect that the carriage of the portmanteau for the loss of which the action was brought, was obtained without compensation and by fraud and misrepresentation. But the same questions were argued and considered on former occasions, and the evidence wholly fails to show either fraud or misrepresentation. There is no pretense that any communication passed between plaintiff and the defendant or any of its agents at the time the portmanteau passed into the possession of the defendant, and it is conceded that the plaintiff personally committed no

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fraud, nor did he intend any. It is claimed, however, that under the arrangement existing between defendant and the Grand Trunk Railway the defendant was not to carry baggage, except as an incident to the carriage of the passenger from whom it would receive a ticket, whereon it could collect compensation for such carriage; that by the manner in which plaintiff's portmanteau was delivered by the agent of the Grand Trunk Railway to the train baggage-man of the defendant, though no communication was made to him beyond the delivery of the baggage, the latter was warranted in the belief that the owner of the baggage accompanied it with a ticket, that but for such belief he would not have received it, and that the inducement of such belief contrary to the real fact constituted fraud upon and misrepresentation to the defendant. The answer to this claim is that such belief was induced by the act of the agent of the Grand Trunk Railway at Montreal, upon whom the defendant relied to affix the proper check. He was in no sense the implied agent of the plaintiff, but the implied agent of the defendant under its arrangement with the Grand Trunk Railway. If he made a mistake by affixing a wrong check, defendant's remedy is against him or the Grand Trunk Railway.

Defendant having incurred, by its acts, the responsibility of a warehouseman, at least, the non-delivery of the property was sufficient to raise a presumption of negligence. This the defendant was bound to remove by proof showing that sufficient ordinary care had been bestowed upon the property, and, in order to establish such sufficient ordinary care, the proof should show, affirmatively, that the loss, however it may have occurred, was not caused by any want of proper care and diligence on its part. If the proof comes fully up to this requirement, the question of negligence may be determined as matter of law. But if, in respect to such

Statement of the Case.

question, the fair and legitimate inference from the evidence is favorable to plaintiff's cause of action, or reasonable minds may differ as to the proper inferences to be thus drawn from the evidence, the question is one of fact, and it must be determined as such (*Coleman v. Livingston*, 36 *N. Y. Superior Ct.* [4 *J. & S.*] 37; reargued, *Id.* 231; and affirmed, 56 *N. Y.* 658; *Burnell v. N. Y. Central R. R. Co.*, 45 *Id.* 184).

The court of appeals having decided in the case at bar, that upon the evidence, the question of defendant's negligence should be left to the jury, it was submitted to them as a question of fact, in a manner quite favorable to the defense, and the jury determined it against the defendant.

Numerous exceptions were taken to the refusal of the court to dismiss the complaint, to the charge as delivered, and the refusal of the court to charge, as requested by defendant's counsel, but on examination, I failed to discover any which call for a new trial.

The judgment and order should be affirmed, with costs.

SPEIR, J., concurred.

ISAIAH KEYSER, TRUSTEE, &C., OF THE ESTATE OF
ADAM KLEIN, DECEASED, PLAINTIFF AND APPEL-
LANT, v. FRANKLIN KELLY, AS EXECUTOR,
&C., OF JAMES KELLY, DECEASED, DEFENDANT
AND RESPONDENT.

EXECUTORS AND ADMINISTRATORS, COSTS AGAINST.

Before bringing an action to recover a strictly legal claim against an estate, its owner should present the same to the executor or

Opinion of the Court, by FREEDMAN, J.

administrator, pursuant to § 41, tit. 3, chap. 6, of the revised statutes.

An executor or administrator, exempt from costs in an action under and by virtue of that section of the revised statutes, cannot be made liable under section 317 of the Code.

Before SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

Appeal by plaintiff from order refusing to grant costs to be paid out of the estate of defendant's testator, the plaintiff having recovered judgment.

G. W. Cotterill, for appellant.

D. R. Jaques, for respondent.

BY THE COURT.—FREEDMAN, J.—At the time the defendant as executor of James Kelly, deceased, advertised for claims, the plaintiff, who had been appointed trustee of Klein's estate as the successor of James Kelly, deceased, had, as such trustee, a legal claim against Kelly's estate, arising from the improper investment by said James Kelly of part of the trust fund belonging to Klein's estate. The liability was a strictly legal one, and the mere fact that plaintiffs' appointment as trustee under the last will and testament of Adam Klein, deceased, had to be made by a court of equity, did not turn it into a mere equitable one.

The claim was therefore one within section 41, of title 3, chapter 6, of part II. of the revised statutes, and consequently should have been presented before suit brought. Where executors are exempt from costs by virtue of that section, section 317 of the Code does not allow costs against them.

The plaintiff having failed to disclose any of the grounds upon which the court is authorized to award costs, the motion was properly denied (*Morgan v.*

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Skidmore, court of appeals, November 22, 1870, MS., reversing 55 *Barb.* 263, as to costs ; *Howe v. Lloyd*, 2 *Lans.* 337 ; *Mersereau v. Ryers*, 12 *How.* 301 ; *Fox v. Fox*, 22 *Id.* 453).

The decision in *Sands v. Craft*, 10 *Abb. Pr.* 216, is not authority to the contrary. That suit was by the plaintiffs, as executors and trustees, against the executors of a deceased co-executor and trustee, and the object of the action was to adjust and recover the amount of the assets held by the decedent at the time of his death as such co-executor. It was for these reasons that it was held, that the claim against the estate of the deceased was not referable under the statute. *Yorks v. Peck*, 9 *How.* 201, was a suit in equity.

The order should be affirmed with costs.

SPEIR, J., concurred.

ALBERT C. LAMSON, PLAINTIFF AND RESPONDENT,
v. STEPHEN A. MAIN, DEFENDANT AND AP-
PELLANT.

REAL ESTATE BROKER.

HIS EMPLOYMENT AND COMMISSIONS.

Where there is a conflict of evidence as to the fact of his employment, and also in regard to the sale of the property having been effected through his agency, and the case was properly submitted to a jury, the verdict cannot be disturbed.

The court held in this case that the withdrawal of the question of the sale of the property having been effected through the agency of the plaintiff, from the consideration of the jury, by the direction of a verdict for the defendant, and its consequent

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determination as matter of law by the court, would have been error.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

Appeal by defendant from judgment entered upon verdict of jury, and from order denying motion made on minutes for a new trial.

Arthur, Phelps, Knevals, & Ransom, attorneys;
Erastus L. Ransom, of counsel, for appellant.

Sidney S. Harris, for respondent.

BY THE COURT.—FREEDMAN, J.—The action was brought by plaintiff to recover from defendant the sum of \$640.00, alleged to have been earned by him a commission as a real estate broker by selling a house belonging to defendant.

The defendant denied the complaint, and claimed that he had employed one Richard Murphy, a real estate broker, to sell the house in question, that Murphy did sell it to one Leath, and that he, the defendant, had paid Murphy the commission therefor.

Upon the trial evidence was given on both sides and the questions of fact arising thereon submitted to the jury under instructions which were quite favorable to the defendant. No exception lies to the charge as delivered, and indeed no complaint is made of it.

It was conceded on the argument that as to plaintiff's employment as a broker the conflict of evidence was of so decided a character that the verdict of the jury on that point cannot be disturbed.

Upon a careful examination of the whole evidence it appears that a sufficient conflict also existed in regard to the question whether plaintiff's agency was

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in point of fact the procuring cause of the sale. True, the purchaser and Murphy both swore that their information was not derived from plaintiff. But the plaintiff gave facts and circumstances to the contrary, and his version was supported by the testimony of a witness who, it is conceded, was employed by defendant to take charge of the house pursuant to plaintiff's recommendation. The purchaser may have been mistaken in his testimony ; Murphy seems to have had as much interest in defeating plaintiff's claim as the plaintiff had in sustaining it, and the defendant had no personal knowledge upon this branch of the case. Under these circumstances, the decision of the question whether in point of fact plaintiff's agency was or was not the procuring cause of the sale, depended so much upon the just weight to be attached to the testimony of the different witnesses according to the probabilities of the case and the inferences to be fairly and legitimately drawn from such testimony, that the withdrawal of the question from the consideration of the jury by the direction of a verdict in defendant's favor and its consequent determination as matter of law, would have been error. This being so, the verdict cannot be set aside as being against evidence or the weight of evidence.

The judgment and order should be affirmed with costs.

SEDGWICK and SPEIR, JJ., concurred.

Statement of the Case.

THOMAS H. HARDING, PLAINTIFF AND APPELLANT, v. JANE E. HARDING, DEFENDANT AND RESPONDENT.

DIVORCES.

Notwithstanding the determination of the issues by the referee, in favor of the divorce, the court, in the proper exercise of its supervisory power, upon the hearing of exceptions to the report, may withhold judgment of divorce upon the ground of insufficiency of proof of the alleged adultery, as also for the reason that there was sufficient evidence of condonation.

But the court cannot on this hearing of the motion to confirm the report, and the exceptions thereto, dismiss the plaintiff's complaint upon the merits.

Where a party excepts to a report and brings those exceptions to a hearing, the motion is substantially a motion for a new trial, and the party making it is not entitled to relief exceeding that which is usually awarded to a party successfully moving for a new trial on a case or exceptions under section 265 of the Code, namely : No absolute judgment should be given where the question is one that can be determined by further proof; but an order should be entered (if it is a case for a new trial), setting aside the report, vacating the order of reference, and ordering a new trial of the issues, thus leaving the contesting parties free to select any of the modes of trial prescribed by the Code. In a case where no answer has been made, nor issue joined, but only a reference to take testimony and report, on the coming in of the report, the court may send back the report to the referee, with directions to take further proof, if the court deem the proofs insufficient.

In this case the court affirms that part of the order of the court below that denies plaintiff's motion for the confirmation of the report, but modifies that part of the order dismissing the complaint on the merits, and directs an order to the effect of setting aside the report, vacating the order of reference, and ordering a new trial of the issues, with costs to the defendant to abide the event, and a reversal of the judgment entered upon the dismissal of the complaint.

Statement of the Case.

Former practice of the court of chancery in divorce cases reviewed and compared with the present practice.

The statutes, practice and rules relating to divorces fully discussed in *Sullivan v. Sullivan*, 41 *N. Y. Super. Ct.* (9 *J. & S.*) 59, and in *Blott v. Rider*, 47 *How. Pr.* 90.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

The action is brought to dissolve marriage on the ground of adultery of the defendant with one William Zandt.

The answer denies the adultery and alleges condonation. Upon consent an order of reference was made to hear and determine all the issues. The referee reported in favor of the plaintiff upon all the issues. The defendant duly filed her exceptions to the referee's report. The plaintiff moved upon the referee's report and the testimony to confirm such report. The defendant moved at the same time upon the exceptions, report and testimony, to vacate such report, and for further relief. Defendant's motion was granted and plaintiff's motion denied. Upon the settlement of the order defendant's attorney made default, and plaintiff's attorney entered an order recommitting the report and testimony to the referee. Upon motion this default was opened, and after full argument an order was made dismissing the complaint upon the merits. A decree was entered accordingly. Plaintiff appealed from the order of dismissal and the judgment entered thereon.

James M. Smith, of counsel for appellant, urged :— That the issues in the case were referred to the referee to hear and determine the same, not to take testimony and report the same to the court, as was the chancery

Appellant's points.

practice where such matters were sent to a master in chancery. The report of the referee in this case, like the verdict of a jury in a case of conflicting evidence, is conclusive as to questions of fact. He takes the testimony, sees and hears the witnesses, and is quite as well able as a jury to come to a correct conclusion upon the facts (*Davis v. Allen*, 3 *N. Y. [3 Coms.]* 168 ; *Ritter v. Cushman*, 35 *How. Pr.* 248 ; *Hoagland v. Wight*, 7 *Bos.* 394). The rule of the court that no judgment in an action for divorce shall be entered except upon the special direction of the court, was adopted doubtless with the object of preventing any possible fraud or collusion of the parties. It never was intended, that a judge, sitting at special term, should have the powers of an appellate court, to decide upon the weight of evidence, in a case where there was a conflict of evidence, and to review exceptions in a case after a referee in a contested trial to whom the issues have been referred to hear and determine, and before whom a long and careful trial has been had, has made his decision. The statute provides for a trial by a referee, and no rule can alter that statute. In *Waterman v. Waterman*, 37 *How. Pr.* 43, the court say: "The Code does not allow of a reference to take the evidence and report it to the court, with the opinion of the referee merely, nor of any reference, except for a trial of the issue in a case where an issue has been joined in the action. It is a part of the system inaugurated by the present constitution (art. 6, sec. 10)—that the former practice in equity suits by evidence taken before an examiner, and not in the presence of the tribunal deciding the issues, should be done away, and it is only in cases where no issue has been joined, or where some interlocutory question is involved, that a reference to take and report evidence is not allowable" (*Code*, §§ 271, 246). Same case, p. 40: "It is true that the authority of this court to grant divorces is

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derived from the statute. The title in the revised statutes, which confers the authority, shall be exercised by the ordinary proceedings in a chancery suit, except when it makes specific provisions to the contrary (2 *R. S.* 142, 149, 1st Ed.). Under the Code, the requirement that the facts contested by the pleadings shall be tried by a jury is modified by section 253 as follows: "An issue of fact in an action for a divorce from the marriage contract on the ground of adultery must be tried by a jury, unless a jury trial be waived as provided in section 266, or a reference be ordered as provided by sections 270, 271. Here is a clear authority to dispense with a jury trial and substitute a trial by the court or referee." The referee takes the place of the court or jury, and the report of a referee in a case at issue should be confirmed, leaving the party defeated to his or her remedy of appeal. The case of *Renwick v. Renwick*, cited by the chief justice, in 10 *Paige*, 420, in support of the doctrine "that, no matter what may have been decided by the referee, the court must finally determine" has no application to this case, and does not in the slightest degree militate against the propositions we have set forth under this point. That case was decided in 1843 under the chancery practice. No defense was interposed, and the matters were referred to a master in chancery, to take proof of the facts and report the same, with his opinion; not to hear and determine, as is now the practice. The case of *Van Epps v. Van Epps*, in 6 *Barb.* 320, also cited by the chief justice, was also under the chancery practice (1843). The case of *Merrill v. Merrill*, 11 *Abb. N. S.* 74, sustains our position. Judge JONES says: "When an issue is joined, that issue must be disposed of in some way authorized by the law. It can be disposed of only by a trial and there are but three modes of trial: one by

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jury, and one by the court, and one by a referee (*Code*, §§ 253, 254, 255). When issues joined in the cause are referred, the referee must determine the issue. The report of the referee should therefore have been confirmed, leaving the defendant to seek her remedy by appeal if she so desired. There are no exceptions in the case, taken by her, which are at all tenable. While the appellant insists that the only proper course for the learned chief justice who heard the motion, to pursue, was to confirm the report, still if there was any irregularity or any requirement of the statute which had not been complied with, the only other order that the court at special term could make was an order recommitting the report and testimony of the referee to take further proof of the facts, and the order of October 16, 1876, was therefore proper, and should have been allowed to stand. The practice is the same whether the cause be submitted on the report without an appearance by the defendant, or on argument of exceptions to the report (2 *Van Santvoord's Equity Practice* [2nd Ed.] 240). The order of January 27, 1877, vacating the order of October 16, 1877, denying the plaintiff's motion, and dismissing his complaint on the merits, and the judgment thereon of March 5, 1877, both of which have been appealed from, should be set aside, and an order entered confirming the referee's report, leaving the defendant to her appeal therefrom. Under the statute (2 *R. S.* 145, § 40) "the court may award a new or further trial of such issue, as often as justice shall seem to require." If this plaintiff is not entitled to his judgment absolute, justice certainly requires that a new trial should be ordered.

George Gallagher, of counsel, for respondent, urged:—That the court, at a special term, had full power to vacate the referee's report and to dismiss the

Respondent's points.

complaint on the merits of the case. 1. A motion to this effect had regularly been made, and notwithstanding the referring of all the issues to the referee, to hear and determine, the court still retained its supervisory power (*Sullivan v. Sullivan*, 9 *Jones & S.* 519; see also opinion of the chief justice, and cases cited). The appellant assumes the position that the court cannot make any decree at all, should it, in the exercise of its supervisory powers, consider that the findings of the referee were improper; that it must in such case invariably recommit the report. Suppose this to be done, once and repeatedly—say fifty times, and still the same report is sent in, and the court still considers the findings unsupported by the testimony, though the merits have been fully and exhaustively developed, must there never be a final decree? must there be a perpetual game of battledore between the court and the referee? When can a final decree be made? “When all the facts and circumstances, material and necessary to a complete explanation of the matters in litigation are brought before the court, and so fully and clearly ascertained on both sides, that the court is enabled, upon a full consideration of the case made out and relied on by each party, finally to determine between them, according to equity and good conscience” (1 *Wait Pr.* 438). 2. The statute, in express language, authorizes a dismissal of the complaint when forgiveness is shown. Supposing the appellate court to hold broadly that in an action for divorce on the ground of adultery, where all the issues are referred, the court, at special term, has no power to give judgment contrary to the findings of the referee upon the issue of adultery, it must make an exception when the defense of *condonation* has been established. The statute says: “Although the fact of adultery be established, the court may deny a divorce in the fol-

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lowing cases : 2nd. Where the offense shall be forgiven, &c.” (3 *R. S.* [5th Ed.] 236, § 55). The learned chief justice, in his opinion, says : “ The proof of the forgiveness by the plaintiff of the alleged offense of defendant is so fully in accordance with the statute that, even if the defendant had committed the offense, the plaintiff could not maintain his suit ;” and the court, therefore, by virtue of the power conferred by statute, denied the divorce—*i. e.*, dismissed the complaint. This power to deny a divorce is clearly conferred upon the court, and not upon the referee. The opinion of Mr. Justice MONELL, in *Amory v. Amory* (6 *Robt.* 516), is analogous. Though the appellate court see fit to vacate and reverse the order and judgment appealed from, it would not be proper to go further and confirm the report of the referee, and give judgment in favor of the plaintiff. Though the appellate court should hold that an error was made at special term, and that the court exceeded its powers in dismissing the complaint, even then the plaintiff should not have a new trial. The interests of justice do not require it, and from the merits of the case, the plaintiff does not deserve it.

BY THE COURT.—FREEDMAN, J.—In *Sullivan v. Sullivan*, 41 *N. Y. Superior Ct.* (9 *J. & S.*) 519 ; and *Blott v. Rider*, 47 *How. Pr.* 90, the policy of the statute relating to the granting of divorces, the reason for the enactment of the ninety-second rule, and the practice on reference of the issues, have been fully discussed.

The order of reference in the case at bar was in all respects regular. But the court at special term, in the exercise of its supervisory power, saw fit to withhold judgment of divorce notwithstanding the issues had been determined by the referee in favor of the plaintiff.

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The only question, therefore, which is open for review is whether the power was properly exercised upon the facts before the court.

Upon examination of the testimony I am satisfied that upon the ground of insufficiency of proof of the alleged adultery, as well as for the reason that, even in case of adultery, there was evidence showing condonation, the court below was fully justified in denying plaintiff's motion for confirmation of the report and in sustaining defendant's exceptions.

But in absolutely dismissing plaintiff's complaint upon the merits, the court went too far.

The defendant had excepted to the report and brought the exceptions to a hearing. Her motion was substantially a motion for a new trial, and though she was not bound to make it on a case prepared and settled as if the trial had been had by jury, she was, on the other hand, not entitled to relief exceeding that which is usually awarded to a party successfully moving for a new trial on a case or exceptions under section 265 of the Code. In the last-mentioned case no absolute judgment is given when the question is one that can be obviated by proof, but the order simply sustains the exceptions, if any there be, and the ruling made or verdict rendered at the trial is set aside and a new trial ordered with costs to the moving party to abide the event.

Formerly in an action for divorce on the ground of adultery, the court of chancery directed a feigned issue to be made up for the trial of the facts contested by the pleadings, and the court was expressly empowered by statute (2 R. S. 145, § 40) to award a new or further trial of such issue as often as justice should seem to require. Under our present system of procedure and the rules of the courts specially applicable to actions for divorce, the trial of the issue of adultery

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by a referee may be looked upon as one of the modes of trial which have been substituted for the trial by feigned issue, and hence in this class of cases the court at special term does possess the power to order a new trial.

The power, as already stated, should be exercised as nearly as possible in conformity with the principles which control on a motion for a new trial on a case or exceptions. Consequently, if the exceptions are sustained and the question is capable of being obviated by proof, no absolute judgment should be directed, but a new trial ordered. And if it is a case for a new trial, the report should not be sent back to the referee with directions to take further proof, as may be done in a case of no answer, but the report should be set aside, the order of reference vacated, and a new trial of the issues ordered. In such case the contesting parties are again free to select any one of the three modes of trial prescribed by the Code.

That part of the order of January 27, 1877, which denies plaintiff's motion for confirmation of the report, should be affirmed ; but the remaining part should be modified so as to provide that the report be set aside, the order of reference vacated and a new trial of the issues had, with costs to the defendant to abide the event. The judgment of March 5, 1877, should be reversed altogether.

SEDGWICK and SPEER, JJ., concurred.

Statement of the Case.

JAMES McMAHON, PLAINTIFF AND RESPONDENT,
v. PETER H. WALSH, DEFENDANT AND AP-
PELLANT.

NEGLIGENCE. PERSONAL INJURY CAUSED THEREBY.

DAMAGES, NOT EXCESSIVE.

Where the personal negligence of the master has directly caused the injury, the master's liability to the servant is the same as it would be to a person not a servant.

In a case where no motion was made for the dismissal of the complaint, nor for the direction of a verdict, but the case was treated on the part of the defense throughout as one which could be disposed of by a jury only, and it not appearing from the evidence how the case could have been taken from the jury, the judgment should not be disturbed on the ground that the verdict was against the weight of evidence.

The verdict was for \$1,000. Plaintiff's injuries resulted in the loss of a third finger of the left hand; and it appeared that he was confined ten days in the hospital, and subsequently frequently returned there for treatment; that he was compelled to carry his hand in a sling for three months; that it took eight months to heal, and ever since that injury plaintiff was unable to do the same work that he had been accustomed to before that time, or to earn the same amount of wages. *Held*, that under these circumstances the verdict should not be set aside on the ground that the damages were excessive.

Before SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

Appeal from judgment entered upon verdict of a jury and from order denying defendant's motion on the minutes for a new trial.

The action was for personal injury occasioned by defendant's negligence.

The jury rendered a verdict for plaintiff for \$1,000.

Opinion of the Court, by FREEDMAN, J.

Redfield & Hill, for appellant.

Nelson Smith, for respondent.

BY THE COURT.—FREEDMAN, J.—The action proceeded upon defendant's *personal* negligence in the control of the operation of the machinery that caused the injury. In such a case the master's liability to the servant is the same as it would be to one not a servant. Testimony was given on both sides, and the whole case submitted to the jury under a charge which was quite favorable to the defendant, and to which no exception lies. No motion was made for the dismissal of the complaint or the direction of a verdict, but the case was treated on the part of the defense throughout as one which could be disposed of by the jury only. Nor does it appear how upon the evidence it could have been taken from the jury. The judgment therefore should not be disturbed on the ground that the verdict was against the weight of evidence.

Plaintiff's injuries resulted in the loss of the third finger of the left hand, and it appeared that he was confined ten days in the hospital and subsequently frequently returned there for treatment; that he was compelled to carry his hand in a sling for three months; that it took eight months to heal, and that ever since that time he was unable to do the same work he was accustomed to, or earn the same wages. Under these circumstances the verdict cannot be deemed excessive.

The judgment and order should be affirmed with costs.

SPEER, J., concurred.

Opinion of the Court, by FREEDMAN, J.

AUGUSTA STRUPPMAN, ET AL., PLAINTIFFS, v.
AUGUSTA MULLER, ET AL., DEFENDANTS.

APPEAL ; WITHDRAWAL AND DISMISSAL OF.

Where an appeal has been dismissed on the consent of the *only* appellant, *no other party to the action* has a right to move the general term afterwards for an affirmance of the order or judgment appealed from. The party appellant or the parties appellants are the only parties who can move the court in favor of the appeal.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

Motion to vacate order.

BY THE COURT.—FREEDMAN, J.—Upon proof that the appeals of the infant defendants Muller, from the orders of December 22, 1876, had been withdrawn pursuant to a stipulation entered into by the parties to said appeals, the general term, on February 23, 1877, granted an order dismissing said appeals without costs, and such order was duly entered.

This having been done, another party to the action, who had no interest in said appeals, not having in fact appealed, has no right to procure, at a subsequent general term, an order of affirmance of the orders of December 22, 1876, by default. The party appellant or the parties appellants are the only parties who can move the court in favor of the appeal.

The order of March 5, 1877, should be vacated and set aside.

SEDGWICK and SPEIR, JJ., concurred.

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Statement of the Case.

THE HIGHLANDS CHEMICAL AND MINING
COMPANY, PLAINTIFF AND APPELLANT, v.
JOHN MATTHEWS, DEFENDANT AND RESPOND-
ENT.

CONTRACT IN WRITING ; FAILURE TO PERFORM.

DAMAGES FOR NON-PERFORMANCE.

A written contract must be considered as the repository and evidence of the final intentions and understandings of the parties thereto; and where there is no uncertainty as to its object or extent, or as to its meaning, it is to be conclusively presumed, that the whole contract of the parties, and its object, purpose, and meaning are contained within the writing; and all oral testimony of conversations or declarations of the parties, previous to or at the time when the contract was completed, should be rejected, as also conversations or declarations of the parties afterwards, in regard to the contract or the subject-matter thereof

The differences between the contract price and the lowest market price of the articles that were not delivered as contracted for, constitute the damages for non-delivery.

Before SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

Appeal from judgment and order refusing new trial.

The complaint alleged a sale and delivery of 1051 carboys of oil of vitriol or sulphuric acid by plaintiff to defendant, and the action was brought to recover their price.

The answer set forth a written contract, alleged that plaintiff failed to deliver a large number of the carboys called for thereby, and claimed damages by reason thereof.

Plaintiff's reply alleged that the contract was subsequently modified by an agreement that defendant should not require over fifty carboys per day, and denied the remainder of the answer.

Opinion of the Court, by FREEDMAN, J.

On the trial the court held that no such modification of the contract as alleged in the reply had been proven, and that defendant was therefore entitled to recover on his counter-claim; that the measure of his damages was the difference between $1\frac{3}{4}$ cents per pound, the contract price, and $2\frac{1}{2}$ cents per pound, the market price, on the amount remaining due and undelivered, and directed a verdict for defendant for \$2,440.76, being the balance of said counter-claim over and above the amount of plaintiff's demand. To this direction, plaintiff excepted. It thereafter moved for a new trial on the minutes, which was denied, and appealed from both order and judgment.

North, Ward & Wagstaff, attorneys, and *Thomas M. North*, of counsel, for the plaintiff.

Miller, Peet & Opdyke, attorneys, and *Henry L. Burnet*, of counsel, for defendant.

BY THE COURT.—FREEDMAN, J.—By the contract in question the plaintiff undertook to supply or furnish defendant with oil of vitriol or sulphuric acid of a certain standard for one year from the date thereof, and the defendant had the option to call during that term for not more than 10,000, nor less than 7,000 carboys. These the plaintiff agreed to deliver at any place to be designated by the defendant within the limits of the City of New York in lots of not less than ten carboys. The contract provided for the rendition of monthly statements of account and their settlement, and that on April 25, 1874, which is one year from the date of it, it should terminate, without reference to the number of carboys of acid delivered. But there was no restriction as to the use which the defendant was to make of the acid. Whether he needed it in the ordinary course of his business as a soda water manufacturer, or as a

Opinion of the Court, by FREEDMAN, J.

wholesale or retail dealer in the article itself, did not concern the plaintiff, and no such limitation can be engrafted upon the contract by the court. The parties stood on an equal footing when they made it; they well understood its object, purpose, scope and meaning, and hence the court cannot make a new or different contract for them.

Having been reduced to writing, it must be taken to be the repository and evidence of the final intention and understanding of the parties. The rule is elementary that when parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing; and all oral testimony of a previous *colloquium* between the parties, or of conversations or declarations at the time when it was completed, or afterwards, is rejected.

No mere improvidence in the terms of the contract, or difficulty in its execution, if any were shown, can therefore impair plaintiff's obligations thereunder.

It is only where the language of a contract is indefinite or ambiguous, that explanatory testimony can be given or the acts of the parties in carrying it out be received as a practical construction of it. But the case at bar is not of this character. The contract is plain and unambiguous, and to incorporate the limitation contended for by plaintiff would not be in explanation, but in restriction of the terms of the contract. In *Kemp v. Knickbocker Ice Co.*, recently decided by the court of appeals, the limitation was in the contract itself.

Inasmuch, however, as the contract in question did not provide for any specific quantity to be de-

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livered per day or month during the life of the contract, it was undoubtedly competent for the parties to regulate the quantity to be delivered at regular intervals by agreement outside of the contract. But the case contains no evidence which would have authorized the jury, if the question had been submitted to them, to find that such regulation was in point of fact entered into between the parties as a modification of the contract. Nor was there evidence, sufficient to carry the case to the jury, that the defendant waived any of his rights under the contract, or that he ever refused to receive any of the acid when the plaintiff was ready and willing and offered to deliver it.

The rights of the parties are therefore to be determined strictly according to the terms of their contract, and under that the defendant had a right to insist that during the twelfth month the plaintiff should deliver acid sufficient to make up the 10,000 carboys called for by the contract. The defendant having made such demand, and plaintiff having refused, the defendant was entitled to the damages sustained in consequence of such non-delivery. The evidence showed that on April 25, 1874, there remained undelivered 3,700 carboys; that the average weight was 166 8-10 pounds; and that the defendant's damage was at least $\frac{3}{4}$ cents a pound, that being the difference between $1\frac{3}{4}$ cents, the contract price, and $2\frac{1}{4}$ cents, the lowest market price which appeared in evidence.

Under these circumstances, there being no material conflict of evidence, the trial judge properly refused to submit to the jury any of the matters requested by the plaintiff, and properly directed a verdict for the defendant, representing the difference between plaintiff's claim for balance due on acid delivered, and the lowest estimate of damages sustained by defendant in consequence of the non-delivery of the balance.

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The judgment and order appealed from should be severally affirmed with costs.

SPEIR, J., concurred.

DEMETRIO F. AROSEMENA, PLAINTIFF AND
RESPONDENT, v. ANGELINE HINCKLEY,
DEFENDANT AND APPELLANT.

ACTION FOR THE RECOVERY OF PERSONAL PROPERTY. WHEN DEMAND NECESSARY BEFORE ACTION.

TRUSTEE OF AN EXPRESS TRUST MAY BRING ACTION, &c.

A bill of sale of furniture, payable in installments, provided that if default was made in any payment, that then all the payments previously made should be forfeited, and the furniture should be reconveyed and forfeited to the vendor, without consideration.

Held, that after a demand of payment and a refusal or neglect to pay, that a demand for the furniture must be made before an action for its recovery could be maintained.

In such an action the value of the property fixed by the bill of sale, less the amount of the installments paid on the same by the vendee, is the value to be assessed by the jury, in finding a verdict for the plaintiff; and the interest on such value from the time of the demand, is the amount of damages to be assessed for its detention.

A trustee of an express trust can bring and maintain an action based upon a contract executed by him in that capacity.

Before SPEIR and FREEDMAN, JJ.

Decided August 31, 1877.

Appeal from a judgment and order denying a new

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trial. The facts in the case appear in the opinion of the court.

James M. Smith, attorney and counsel, for appellant.

Stickney & Shepard, attorneys, for respondent ;
Albert Stickney, of counsel, for respondent.

BY THE COURT.—SPEIR, J.—The plaintiff by his deed sold certain furniture to the defendant for \$2,950, to be paid in installments. The deed provided “that if default be made in any of the payments above agreed to be made, that then the payments then made thereon shall be forfeited to the party of the first part, and the said goods, chattels, and effects shall be reconveyed and forfeited to him without consideration.” Certain installments appear not to have been paid, and the suit is brought to recover the furniture for non-payment of the balance then due and after an alleged demand of the defendant for the furniture.

After the testimony was closed the defendant moved that the complaint be dismissed upon the ground that the plaintiff was not the owner of the furniture, that a judgment had been given against the owner in an action brought by her, and that no demand of the furniture had been proved by a preponderance of testimony.

The court submitted the question of demand for the furniture and whether it was made after the demand for payment and the admitted default in payment. He charged if the jury found for the plaintiff they must find a verdict in his favor for the sum fixed in the agreement, as the value of the property, which was \$2,950, after deducting the amounts paid on it by defendant \$205, taking the value of the property on November 30, 1874, and in addition thereto interest as dam-

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ages for detention. The defendant claims the property under the deed of sale, and admits default in payment and the demand for payment. She denies that the demand for the furniture was made. On this last question the jury have found against her.

It was admitted on the trial that judgment in an action by one May against this defendant was entered in her favor, and that an appeal was taken therefrom to the general term by said May, and that the appeal was dismissed, and that that action was brought for the recovery of this same property. The plaintiff in this action also testified that he was not the owner of the furniture, that he made the sale as the agent of Mrs. May, and that he brought this action with her knowledge and consent and for her benefit.

It is clear enough that the plaintiff is not the real party in interest. It is equally clear that the code abrogated the common law rule, that the right of action followed the legal title, and made the beneficial interest the sole test of the right.

With some exceptions,—such as executors, administrators, &c.,—it expressly declares “that a trustee of an express trust, within the meaning of the section, shall be construed to include a person, with whom or in whose name a contract is made for the benefit of another” (§ 113). The question is raised, is the plaintiff a trustee of an express trust within the definition of the term in section 113 of the code? Was the contract made in his name for the benefit of another? That is the relation of the plaintiff to the owner, as shown by his own evidence in the case; and as such he would be authorized to sue on the bill of sale in his own name although the beneficial interest was in his principal, Mrs. May.

It appears that the case of May v. Hinckley was brought on entirely different grounds from this. This is a new suit and a different and new cause of action.

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The effect of the dismissal of the appeal in that case was a judgment final, and bound all the parties to the deed of sale, upon the issues therein litigated. The terms of the said agreement had been complied with on her part, and legal proceedings were at an end. The judgment entered in that case can be no bar to this action founded upon a subsequent breach.

The judgment and order denying a new trial should be affirmed with costs.

FREEDMAN, J., concurred.

MARIA ALGIE, PLAINTIFF AND RESPONDENT, v.
FERNANDO WOOD, DEFENDANT AND APPELLANT.

I. TRIAL, CONDUCT OF.

1. *BURDEN OF PROOF.*

(a) *NEGATIVE TO BE PROVED, WHEN.*

1. When the right of action or the defense is founded on a negative allegation, the party alleging the negative must establish it.

E. g.: A vendor of real estate sued to recover the consideration agreed to be paid by the vendee, alleging that the vendee agreed to pay \$30,000, deducting therefrom all existing mortgages, liens and incumbrances on the property at the date of the deed; and alleged that the property was subject at the date of the deed to incumbrances amounting to \$24,000; and that the vendee had paid \$500. The action was brought to recover the balance of \$5,500.

HELD,

1. It devolved on the plaintiff to prove the amount of the incumbrances.

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2. It being admitted in the contract that there were liens, proof that there were certain liens was not sufficient to establish that there were no others.

(a) *Presumption of no liens.*—In such case plaintiff cannot rest on a presumption that in the absence of the existence of liens, it will be assumed that there are none.

(b) *Facts more in defendant's knowledge.*—In such case the rule which casts on a party the burden of proving such facts as are more peculiarly in his knowledge than in that of the other, does not apply.

II. EVIDENCE.

1. *RES GESTÆ.*

(a) **WHEN DECLARATIONS DO NOT FALL WITHIN THE RULE.**

1. Declarations made by a party to an action at the time of doing an act between him and a third person, in the absence of the other party to the action, are not admissible in favor of the party doing the act, when the doing of the act was proved in his behalf.

(a) *It is otherwise* if the other party to the action proves the doing of the act.

Before SEDGWICK, SPEIR, and FREEDMAN, JJ.

Decided November 5, 1877.

Appeal from judgment entered on verdict for plaintiff.

The complaint averred that plaintiff by deed, conveyed certain real estate to defendant for the price or sum of \$30,000, which said sum the defendant agreed to pay to the plaintiff, deducting therefrom all existing mortgages, liens and incumbrances to the date of said deed, and to which mortgages, liens and incumbrances, said lots were sold subject. That the plaintiff duly delivered said deed to the defendant, on or about said November 27, 1872. That said lots of land and prem-

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ises were subject at the date of said deed to incumbrances, amounting to the sum of \$24,000. That the said defendant paid to the plaintiff on account of said price or consideration, the sum of \$500, but has failed and neglected to pay the balance thereof, amounting to the sum of \$5,500, in which said last mentioned sum the said defendant is justly indebted to the plaintiff, the same being due, owing, and payable.

The answer averred that the conveyance was made to the defendant at the request of plaintiff, for her own benefit and convenience, upon the express agreement that the defendant was to pay no consideration.

In the course of the trial defendant's counsel called a witness and proved by him that defendant had paid to him a \$500 mortgage on the premises; he then asked the witness, "What did Mr. Wood say at the time he paid it." Which was objected to, the objection was sustained, and defendant's counsel excepted.

Moses B. Maclay, attorney, and *Ira Shafer* and *James M. Smith*, of counsel, for appellant, among other things urged :—I. The judge erred in refusing to charge the defendant's first request to charge, to wit : to direct a verdict for the defendant on the ground that there was no proof that, after taking out all incumbrances to the date of the deed, there would be any sum due the plaintiff.

II. We submit that the judge erred in excluding our offer to show that when Mr. Wood paid Mr. Martin, he, at the time of the payment, said he had no interest in the property, that he held the property for Mrs. Algie, and that he bought it for her benefit, expecting to be repaid out of the property. We submit that when they proved the fact that he made payment, that we have the right to show all that was said and done at that time, as a part of the transaction itself; and the authorities upon that point are

Respondent's points.

so entirely familiar that it is unnecessary to cite them.

W. McDermott, attorney, and of counsel for respondent, among other things, urged.—I. The defendant's counsel moved to dismiss the complaint on the ground that the plaintiff had not proved that there were no other incumbrances on the lots than those proved. 1. The allegation in the complaint is not "that all the incumbrances on the lots were \$24,000," but that "said premises were subject at the date of said deed to incumbrances amounting to the sum of \$24,000." The answer denied this allegation; that is, it denied that the premises *were subject to incumbrances amounting to \$24,000*, but did not allege or claim that they were subject to incumbrances to any larger amount. If the plaintiff had failed to prove that there were any incumbrances on the lots, the defendant having denied that there were any, and not having alleged that there were any, plaintiff would have been entitled to recover the entire sum of \$30,000 unless limited by the demand in her complaint. 2. The burden of proof to show what incumbrances (if any), according to well settled rules, was on the defendant. All matters in reduction of the plaintiff's claim must be proved by the defendant; it is never the duty of the plaintiff to prove matters in reduction of his claim (*Hollister v. Bender*, 1 *Hill*, 150). 3. Plaintiff did prove the incumbrances. She told defendant their amount, including mortgages, taxes, interest and assessments. If they were more, defendant should have proved them to have been more. She also produced the mortgages. 4. The defendant, by not alleging that the incumbrances were more than \$24,000, *admitted* that they were no more than that sum.

II. The defendant offered to prove what he said to Mr. Martin when he paid off a mortgage. It was

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properly excluded. Mrs. Algie was not present, and the defendant's statement, not under oath, as to the terms upon which he took the property, was certainly not admissible.

BY THE COURT.—SEDGWICK, J.—The plaintiff did not attempt to prove, that the defendant expressly promised to pay the consideration, that the complaint stated, viz., \$30,000, after deducting the incumbrances upon the property. On the contrary, she testified that the defendant agreed to pay the whole \$30,000. Of course the action was not for this. The complaint did not claim it, nor did the plaintiff ask for it on the trial. The proof under the complaint would not have supported a verdict that \$30,000 was due. The deed by itself could not justify the conclusion that \$30,000 was due, for the complaint averred the contrary, and showed that the defendant had promised to pay only the difference. If the plaintiff may rely on the promise stated in the complaint, as one implied from all the circumstances, the result is the same, that she can only recover the difference, upon the implied promise to pay that.

In this case, the burden of proof was upon the plaintiff to show what this difference was, and as implied in that to show by some measure of proof that there were no other or greater incumbrances than her testimony admitted to exist. She could not rest upon a presumption of fact, that in the absence of proof to show the existence of a lien, it could be taken for granted there was none—because the agreement itself showed the understanding to be that there were liens.

Nor was the burden upon the defendant to mitigate damage, by showing the existence of liens, for, as the plaintiff left the case, the amount of damages had not been shown, and until there is *prima facie* proof of the

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sum due, the defendant is not called upon for proof to lessen it.

Nor was the amount of the incumbrances peculiarly within the defendant's knowledge. The plaintiff had the same opportunities and the same interest to ascertain them.

As the plaintiff's case involved affirmative and negative propositions she was bound to give evidence to sustain both. "To this general rule, that the burden of proof is on the party holding the affirmative, there are some exceptions, in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions will be found to include those cases in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, the establishment of this negative is an essential element in his case, &c." (*Greenleaf's Ev.* § 78). In this case part of the plaintiff's proof cannot be a presumption that there were no liens, for the reason that the agreement expressly admitted the contrary.

The plaintiff wholly failed to show the amount of unpaid taxes and assessments, going no further than to say they were not large—about \$1,300—but in fact she did not know their amount. I think, therefore, that the case should have been taken from the jury upon the request of defendant's counsel.

I am further of opinion that if the plaintiff had introduced testimony that the defendant had paid the \$500 mortgage upon the premises to Martin, that the defendant would have had a right to show what he said at the time of the payment. The declarations of a party, at the time of delivering money, are a part of the *res gestæ*. In fact, however, the defendant himself introduced the testimony that he had paid the mortgage to Martin, and his offer to show what he said at the time was an attempt to get into evidence his own

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declaration as to his relations to the property. I do not think that the judgment should be reversed for the exclusion of this evidence.

But I think there should be a new trial on the other ground—that the burden of proof was on the plaintiff to show what incumbrances there were on the property, and their amount. She failed to show these things, and the motion to dismiss the complaint should have been granted.

Judgment reversed, new trial granted, with costs to appellant to abide event.

SPEIR and FREEDMAN, JJ., concurred.

HENRY K. ADAMS, PLAINTIFF AND APPELLANT, •
v. S. CHARLES WELSH AND JOHN H.
WELSH, DEFENDANTS AND RESPONDENTS.

I. SHERIFF'S LAW.

1. LEVY, WHAT CANNOT BE LEVIED ON.

(a.) *Money collected by a sheriff*, under an execution cannot, while it remains in his hands, be levied on by him under an execution against the party in whose favor it was so collected.

2. SECTION 193 OF THE CODE OF PROCEDURE.

1. Payment to sheriff by debtor of a judgment debtor against whom he holds an execution.

1. Authority of sheriff over the money received.

(a.) HAS NO AUTHORITY TO APPLY it to the satisfaction of an execution issued against the plaintiff in the execution upon which the payment was made.

2. PAYMENT TO SHERIFF, WHEN NOT A DISCHARGE.

1. *Assignment*.—After the original creditor has assigned the debt, the debtor is no longer indebted him; therefore, a payment thereafter made by such debtor to a sheriff holding an execution issued on a judgment recovered against his origi-

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nal creditor, does not fall within the provisions of section 193, *and is not a discharge of the debt.*

(a.) NOTICE OF ASSIGNMENT.—This although he had *no notice* of the assignment before such payment.

Before SPEIR and FREEDMAN, JJ.

Decided November 5, 1877.

An appeal from an order of the special term directing the sheriff of New York county to satisfy an execution issued to him in this action against the property of the defendants, upon the ground that the defendants have paid on account of another execution issued against the plaintiff by virtue of section 293 of the Code of Procedure.

The defendants on April 27, 1877, recovered, in the court of common pleas, a judgment as executors of George W. Welsh against Henry K. Adams for the sum of \$496.15, and on the same day issued execution thereon against him to the sheriff of the county of New York for the amount of the judgment and costs. On April 30, 1877, Henry K. Adams, the plaintiff in this action, obtained a judgment against the defendants for the sum of \$134.20, and by his attorney gave notice of the entry of the judgment to defendant's attorney. After the receipt of this notice the defendants, on April 30, 1877, paid to the sheriff, under section 293 of the Code, for and on account of Adams on the execution issued against him in the court of common pleas, the sum of \$134.20, the full amount of the judgment recovered by him, and took a receipt therefor from the sheriff. Thereafter, on June 1, 1877, an execution was issued to said sheriff on the judgment recovered by said Adams. This is the execution to compel the satisfaction whereof by the sheriff this motion is made.

E. Platt Johnson, attorney, and of counsel for

Respondent's points.

appellant, upon the points stated in the head-notes, urged :—I. A voluntary payment, under section 293 of the Code, on account of an execution issued against a person to whom the parties paying claim to be indebted, if made after an assignment in good faith, by the person against whom the execution is issued, of the debt intended to be paid, will not avail the parties paying as against the assignee, or constitute a defense in proceedings by him against them for the recovery of the debt so assigned to him (*Robinson v. Weeks*, 1 *Code R. N. S.* 311, and 6 *How.* 161 ; *Richardson v. Ainsworth*, 20 *How. Pr.* 521 ; *Huse v. Guyot*, 3 *Sup. Ct. [T. & C.]* 790 ; *Countryman v. Boyer*, 3 *How. Pr.* 386 ; *Baker v. Kenworthy*, 41 *N. Y.* 216, approving *Richardson v. Weeks* and *Richardson v. Ainsworth*).

II. The fact that the defendants had no notice of the assignment until after the payment to the sheriff was made, makes no difference (*Robinson v. Weeks*, 1 *Code R. N. S.* 311, and 6 *How.* 161 ; *Richardson v. Ainsworth*, 20 *How. Pr.* 521 ; *Huse v. Guyot*, 3 *Sup. Ct. [T. & C.]* 790).

Dennis Quinn, attorney, and of counsel for respondents, upon the questions determined by the court, urged :—I. A payment made under sections 294–297 of the Code of Procedure, to a judgment creditor, of a debt due by a third party, to the judgment debtor, in the absence of notice of the assignment of the debt, is a good and valid payment, and protects the third party from the obligation of paying a second time (*Gibson v. Haggerty*, 37 *N. Y.* 555 ; *Lyman v. Cartwright*, 3 *E. D. Smith*, 118 ; *Mallory v. Norton*, 21 *Barb.* 424 ; *Huntington v. Potter*, 32 *Id.* 300 ; *Muir v. Schenck*, 3 *Hill*, 228 ; *Robinson v. Weeks*, 6 *How.* 161).

II. A payment made in conformity with section 293, the language of which is broad and full, should have equal force and effect given to it as a payment

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made under the provisions of section 294. It is confidently claimed, on the part of the respondents, that the words used in section 293 expressly authorize such a payment as the one made by them. It cannot be imputed to the legislature that this section was enacted to entrap the unwary; on the contrary, the fair interpretation of the words used is obviously to enable a debtor to pay, without additional expense or litigation, a just and undisputed debt (*Muscott v. Woolworth*, 14 *How. Pr.* 480).

III. It is also contended that, on April 30, 1877, after notice regularly given of the entry of the judgment in this court against S. Charles Welsh and John H. Welsh, the respondents, and in the absence of notice of the assignment of the judgment, the defendants, or either of them, could make a good and valid payment of the amount thereof to Henry K. Adams, the appellant, and that such payment would be operative and valid against his assignee. It is further contended that a payment to the sheriff on that day is equivalent, in contemplation of law, to a payment to Adams himself. Notice was intended to protect the debtor, not the creditor, and the assignee of the judgment withheld notice of the assignment at his own risk and peril (*Baker v. Kenworth*, 41 *N. Y.* 218; *Robinson v. Weeks*, 6 *How.* 161; *Muir v. Schenck*, 3 *Hill*, 228; *Gibson v. Haggerty*, 37 *N. Y.* 555; *Lyman v. Cartwright*, 3 *E. D. Smith*, 118; *Hermans v. Ellworths*, 64 *N. Y.* 159).

BY THE COURT.—SPEIR, J.—The rule has been uniform in this State and in the United States courts, that money collected while in the hands of the sheriff is not subject to levy upon an execution against the party in whose favor it was collected. The section of the Code under which the order was made provides, that after the issuing of the execution against property,

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any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid. It is insisted by the defendant's counsel that under this section the sheriff was authorized to satisfy the demand against him for the money collected, by applying it to the payment on the execution in his hands against the party to whom the money was due. I do not think this is the construction of the statute. The debtor is to pay his debt to the sheriff, and take his receipt therefor to discharge his debt. This does not authorize the sheriff to apply the money upon another execution. A voluntary payment by a debtor, without his creditor's authority, cannot be upheld, whether it be to a creditor of his creditor or to any other person. It would be exceedingly anomalous to permit a debtor to determine which of the creditors of his creditor shall be first paid, and select some friend of his own as deserving his favor. Johnson's claim to favor as the creditor of Adams was in law equal to that of anybody else. This construction of the statute has, in terms, been settled in *Baker v. Kenworthy*, 41 N. Y. 215, and although the case does not present the same facts, the principle is established.

But the defendants do not come within the description of persons named in the section. The words are, "any person *indebted to the judgment debtor* may pay," &c. The defendants cannot be said to be indebted to Adams when the latter had assigned all his interest to Johnson. The language of the section cannot be enlarged by applying it to any case other than that provided for by the statute itself. Knowledge of the assignment is immaterial, the fact alone determines the case contemplated. The assignment was made before any judgment was recovered, and is valid if founded upon professional services rendered and to be

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rendered. The consideration is meritorious. There is nothing in the papers showing any fraud.

The order appealed from must be reversed with costs.

FREEDMAN, J., concurred.

JOHN HARRIS AND RICHARD N. JONES, PLAINTIFFS AND RESPONDENTS, v. CHARLES P. BURDETT AND SAMUEL G. POND, DEFENDANTS AND APPELLANTS.

I. *ESTOPPEL BY RECORD.*

1. TITLE TO PROPERTY, effect on proceedings springing out of.

1. A judgment necessarily founded on the ground that a party to the action in which it is rendered, is, by certain acts done by him, estopped from setting up the invalidity of a sale of certain property, *will estop such party in any action* brought by him against the parties to the action in which such judgment was rendered, or their privies, *in which the validity of such sale is involved, from setting up its invalidity.*

(a) PRIVY.—One who holds money or property for a party to such action, *whose right thereto depends on the validity of such sale, stands in privity to such party* as to the money and property so held, so far as to enable him to rely on such judgment as estopping the party against whom the same was rendered from setting up the invalidity of the sale, in an action brought by him against such third person, for the recovery of such money or property.

II. LIBEL IN ADMIRALTY AGAINST VESSEL FOR REPAIRS AND SUPPLIES.

1. LAWFUL POSSESSION of vessel by those ordering the repairs and supplies, at the time of the furnishing thereof, ESSENTIAL to support the libel.

(a) PRIVY TO LIBELLANT.—One who holds *freight money payable to the libellant* by the terms of a charter-party made by

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those claimed to be in lawful possession of the vessel, stands in privity to the libellant.

III. APPLICATION OF ABOVE PRINCIPLES.

1. Plaintiffs were the owners of the vessel Sarah Harris, and sent her on a voyage to Montevideo. Her captain, alleging she had been disabled by stress of weather, put into Porto-Rico, where she was condemned, and sold to Cochran and Fullmore. After the sale, James D. and Wm. C. Lamb made advances to the purchasers for repairs and supplies to the vessel. She was then chartered by Cochran, as master and part-owner, to Lamb, Storer and Gad, for a voyage to New York, with a cargo of molasses consigned to the defendants. The vessel was consigned to Whitney & Co. By the charter-party the freight was payable to the order of Lamb & Co., of St. Thomas, as security for cash advances, and of a draft of said Cochran in case of its protest or non-payment. On the arrival of the vessel at the port of New York, plaintiffs filed a libel against her, and said Cochran and Fulmore, the purchasers at Porto-Rico, alleging in the libel that Cochran and Fulmore wrongfully withheld the vessel, on an alleged ground of title depending on the alleged sale at St. Thomas, which sale the libel alleged to have been made collusively and in fraud of the libellants, and to be void. Upon the libel a decree was entered by consent adjudging that the possession of the vessel be delivered to the libellants.

Thereafter James D. and Wm. C. Lamb libelled the vessel for advances made to Cochran as master, at his request, for repairing and refitting said vessel, for the purpose of enabling him to proceed to sea with safety. John Harris, in behalf of himself and the other plaintiffs in this action, intervened, setting up in substance that a great portion of the claimed advances were not for necessary repairs and supplies; that the condemnation and sale at Porto-Rico were fraudulent and void; that the vessel had arrived at New York, carrying a freight of \$1,800, which was paid to the defendants herein, as the agents, and for account of the libellant; that a decree had been made on the libel theretofore filed by the intervenor adjudging that the possession of the vessel be delivered to the intervenor; and claiming that the freight money be paid over to the intervenor, that by reason of the matters alleged libellant had no lien, and particularly that by reason of the said decree in favor of the intervenor. Upon this libel a decree was made whereby it was decreed that plaintiff recover against said vessel a specified sum, and that she be condemned therefor.

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In the course of the proceedings on this libel, the district judge, before whom the same were had, delivered two opinions. In the first, delivered on making the interlocutory decree, he laid down, among other things, that the intervenor (the claimant) was estopped, as against those libellants, from setting up the invalidity of the sale, because he ratified and affirmed it by his acceptance of the amount of an insurance which he had on the vessel, and by his acceptance and retention of the entire net proceeds of the sale, and by his arrangement with those whom he alleged to be fraudulent purchasers of the vessel at the time he obtained possession of her again—all of which matters appeared in the evidence; that the proceedings taken by the claimant to recover possession of the vessel could not affect the rights of the libellants in that action; and that the libellants were entitled to a lien on the vessel for moneys advanced to her master, Terence Cochran, or otherwise, and which were used to pay for such repairing, supplying, and refitting as was necessary and proper to enable the vessel to proceed to sea with safety, and directed a reference to ascertain the amount of such moneys, reserving the question as to freight moneys.

Upon the coming in of the referee's report, and on making the final decree, he delivered another opinion, in which he laid down that the former decision in the case was that the repairs and supplies furnished were, as far as they were necessary, furnished on the credit of the vessel, so as to create a lien on her under the maritime law; that of the items amounting to \$2,648 claimed to have been advanced for such repairs, many of them could not be allowed for want of proof that they had anything to do with the repairing or supplying the vessel, and others could not be allowed for other reasons, and he reduced the claimed lien to \$365.90 gold, with interest from March 28, 1871, at six per cent.

In this opinion he also laid down that that court could make no adjudication as to the freight moneys.

HELD,

in this action, brought against the consignees of the cargo to recover the freight money, that the decree made in the Lamb libel ESTOPPED the plaintiff's from impeaching the St. Thomas sale.

Before CURTIS, Ch. J., and SANFORD and FREEDMAN, JJ.

Decided November 5, 1877.

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COURT OF APPEALS.

DECISION ON DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' APPEAL TO THAT COURT.

I. Appealability of general term order granting a new trial in a case tried by jury upon an appeal taken from the judgment entered on the verdict, and from an order denying a motion for a new trial.

1. WHEN NOT APPEALABLE.—Not if any material and controverted question of fact is involved, and the general term granted or *might* have granted the new trial on such question of fact.

(a) ACTUALLY GRANTING ON QUESTION OF LAW, EFFECT OF.

1. Although the general term did in fact grant the new trial, solely on questions of law, and so states in its order, yet if the case came before the general term in *such form, and the character of the evidence was such*, that a new trial might have been granted on questions of fact, *the order is not appealable*.

2. WHEN APPEALABLE.

1. When the general order *affirms* the order refusing a new trial on the facts, *and reverses* the judgment on exception.

2. Where the appellant is legally entitled to have a *verdict directed in his favor*.

1. In the latter case, if upon consideration of the evidence and proceedings at the trial this court should determine that any question of fact passed on by the jury was material, the *appeal will still have to be dismissed*, UNLESS some well founded material exception was taken at the trial (whether passed on in the general term opinion or not) *in which case the order may be affirmed and judgment absolute rendered*.

Decided March 26, 1878.

This is an appeal from a judgment, entered on a verdict in favor of the plaintiffs, and also from an order denying defendants' motion, made on the judge's minutes, for a new trial.

The complaint avers, that in May, 1871, plaintiffs were owners of the brig "Sarah Harris." That, during that month, the said vessel, whilst so owned by the

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plaintiffs, received on board, at the port of Humacoa, Porto-Rico, W. I., a cargo of molasses to be delivered to defendants, at the port of New York, on their paying freight therefor, as per bill of lading.

That in June, 1871, the vessel arrived at New York and there delivered her cargo to defendants, who, thereupon, received the same, subject to the payment of such freight; but that, though thereto requested, they have refused and still refuse to pay the same.

The answer admits that the cargo was transported by the brig, as alleged, and was delivered to and received by defendants; but avers that the voyage was prosecuted under a charter-party between one Terence Cochran, then master and part owner of the vessel, and the firm of Lamb, Storer & Gad; and that the freight to be earned on said voyage, under said charter, was by said master and part owner assigned to James D. and William C. Lamb, as security for advances made by them to and for the use of the said vessel, its master and owners; that, by the terms of the charter, the freight was made payable to the order of Lamb & Co., and was paid to them by defendants, on delivery of the cargo, before the commencement of this action, and before any claim was made, or notice of any claim on the part of the plaintiffs was given.

The answer further alleges, that in an action in the district court of the United States for the southern district of New York, brought by the said James D. and William C. Lamb, against the said brig "Sarah Harris," for the purpose of enforcing a lien upon the said vessel, for advances made and supplies furnished thereto, the said John Harris, for and on behalf of himself and his co-owner, intervened and answered, alleging that the freight on the voyage of said vessel to New York (being the same voyage mentioned in the complaint herein), was, by the terms of the charter-party under which such voyage was prosecuted,

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made payable to the order of Lamb & Co., the libellants in said action, and had been paid to defendants in this action, as agents of said libellants, and for their account; that said libellants had no right to such freight, but were bound to account therefor to the respondent Harris, as owner of said brig, and that the amount thereof should be deducted from any amount which might, in said action, be awarded to the libellants.

That a decree was afterwards made in said action, whereby it was adjudged that the said libellants were entitled to a lien upon the said vessel for their said advances and supplies; that a reference was ordered to a commissioner to ascertain the amount thereof, who thereupon made a report to the court, in which such amount was ascertained and stated. That the said commissioner, in and by such decree, was directed also to ascertain and report the amount of freight earned and received by said libellants, and to be credited on said advances, and that said commissioner did make his report stating the amount of such freight.

Upon the trial, it appeared in evidence, on the part of the plaintiffs, that in December, 1870, they were owners of the brig. That in December of that year, she sailed from Annapolis, Nova Scotia, where plaintiffs or one of them resided, under a charter for Montevideo, with a cargo of lumber, and under the command of James Jollymour, as master. That the voyage to Montevideo was never completed, and the plaintiffs received no freight money therefor. That plaintiffs next saw the vessel at Brooklyn, on June 15, 1871, and learned that she had just arrived from Porto Rico, consigned to Whitney & Co., laden with a cargo of molasses consigned to Burdett & Pond, the defendants. That on June 19, 1871, Harris, one of the plaintiffs, had a conversation with Burdett & Pond, and was informed

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by them that, as agents for Lamb & Co., they had received the freight money of the Sarah Harris, and then had it in their possession. That the plaintiff, Harris, thereupon gave to the defendants written notice, bearing date on that day, not to part, or in any way deal, with the said freight money, claiming it, on behalf of himself and his co-plaintiff herein, Richard W. Jones, as owners of the brig.

It further appeared, on the part of the plaintiffs, that under and by virtue of a decree of the United States district court for the southern district of New York, rendered in admiralty on July 5, 1871, in a suit instituted by them against the said brig and against James F. Fulmore and Cochran, the said Fulmore and Cochran appearing and consenting, it was adjudged that possession of the said brig be delivered to the libellants, and that the marshal of the district accordingly placed said vessel, &c., in the custody of John Harris, as owner thereof.

On the part of the defendants, it appeared that the vessel, after sailing from Annapolis, Nova Scotia, in December, 1870, under command of Jollymour, as master, arrived at St. Thomas in a disabled condition on January 23, 1871; that a written application was on that day made by Jollymour, her master, to James D. Lamb, then British consul at that port, for a warrant of survey on said vessel, which was thereupon issued and executed. Further proceedings of like character were subsequently instituted, which resulted in the condemnation and sale of both vessel and cargo.

At the sale, the vessel was purchased by Cochran and Fulmore.

Lamb & Co., who had previously made advances at the request of Jollymour, for account of the vessel and cargo, received the proceeds of the sale, and in their account rendered, credited \$2,776.47 as the proceeds of the cargo, and \$2,266.27 as the proceeds of

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the vessel, charging against such proceeds the advances made and expenses incurred by them, and also two drafts on London, one for £400 sterling at \$5, making \$2,000, and the other for £120 12s. 1d. sterling, making \$603.02, which balanced the account.

The two drafts, with the accounts and documents relating to the sale of both vessel and cargo, and a letter to John Harris, were given by Lamb & Co., to Jollymour, who took them to Annapolis and there delivered them to John Harris, who received the drafts, sold them, and retained the proceeds.

Harris subsequently claimed of and received from an insurance company at Annapolis, which had issued a policy of insurance upon the vessel, the full amount thereof, less the year's premium therefor. Prior to the receipt of such insurance, his suspicions had been excited as to the fairness, honesty and validity of the proceedings for the condemnation of the vessel, and he communicated them to the underwriters, stating that he believed such proceedings to have been fraudulent, and that he intended to libel the vessel. They declined, however, to join him in any effort to recover her, but paid him the money.

There was conflict of testimony as to the interview between Harris and the defendants on June 19, 1871, and as to the notice of plaintiffs' rights and claims, alleged to have then been given by him to defendants. Burdett testified that nothing was said about the freight, on that occasion, to his remembrance; nor did he remember having told Harris that his firm then had the freight money in their possession, though he admits that they did not part with the money nor credit it to Lamb & Co., with whom they had an open account on their books, before June 28. Pond testified that he had no remembrance that Harris called on defendants during the summer of 1871, and that he never saw the notice of plaintiffs' claims, which Harris

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testified that he served on defendants on June 19. There was also conflict in the evidence as to the good faith and honesty of the proceedings for the condemnation and sale of the vessel.

The court submitted to the jury the question, whether the proceedings at St. Thomas for the sale and condemnation of vessel and cargo were honest and fair, charging, in substance, that if not, no title passed by virtue thereof. That if such proceedings were fraudulent, the plaintiffs continued to be the owners, and, as such, were entitled to freight subsequently earned, no matter who might be acting as master. The court further held and charged that the plaintiffs were not estopped from asserting their claim to the freight, either by the decree of the U. S. District Court in favor of Lamb & Co., or by their own acts in receiving and appropriating the drafts remitted by Lamb & Co., and the insurance money on the vessel. That if the jury found that plaintiffs continued to be the owners, notwithstanding the condemnation and sale at St. Thomas, and gave timely notice to defendants of their claim to the freight, they were entitled to recover.

The court also submitted to the jury the question whether the defendants paid over to Lamb & Co. the amount of such freight before receiving notice of plaintiffs' claims.

The jury rendered a verdict in favor of the plaintiffs, and defendants' motion for a new trial, on the minutes, was denied.

From the judgment entered on the verdict, and from the order denying such motion, the defendants now appeal.

Burrill, Davison & Burrill, attorneys, and *Chas. A. Davison*, of counsel, for appellants, urged:—I. It was adjudged in the admiralty suit between Lamb & Co. and the plaintiffs, that, without reference to the question of

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the validity or invalidity of the proceedings for the condemnation and sale of the "Sarah Harris," at St. Thomas, the same were, nevertheless, binding upon the plaintiffs so far as Lamb & Co. were concerned; and the evidence in the present action, showing that advances were made by Lamb & Co. additional to those included in the decree in the admiralty suit, such decree is *res adjudicata* on the question of the right of Lamb & Co. to the benefit of the provision in the charter-party giving them a lien on the freight moneys as security therefor. Although the decree in the admiralty suit did not give Lamb & Co. a lien, yet it showed that they advanced the moneys, and for these moneys the freight was properly pledged by the charter-party. Judgment on a question directly involved is conclusive in a second action between the same parties or their privies, depending on the same question, although the subject-matter of the second action is different from the subject-matter of the first (*Doty v. Brown*, 4 *N. Y.* 71; *White v. Coatsworth*, 6 *Id.* 137; *Castle v. Noyes*, 14 *Id.* 329; *Tompkins v. Hyatt*, 28 *Id.* 347; *Newton v. Hook*, 48 *Id.* 676; *Treadwell v. Stebbins*, 6 *Bosw.* 538; *Jones v. Scriven*, 8 *Johns.* 453; *Goddard v. Benson*, 15 *Abb. Pr.* 191; *Knanth v. Bassett*, 34 *Barb.* 31). The judgment, sentence, or decree of a court of exclusive jurisdiction is also conclusive between the same parties upon the same matter, although coming incidentally in question in another court for a different purpose, and is not only *conclusive* of the *right* which it establishes, but of the *fact* which it directly decides (*Williams v. Armroyd*, 7 *Cranch*, 423).

II. The decree in the admiralty suit is, at all events, a binding adjudication that there was a balance due Lamb & Co. for advances, amounting to \$365.90; and the same never having been paid, and the decree therefor still being in full force and effect, is *res ad-*

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judicata as to the question involved in the present action.

III. Even if the decree in the admiralty suit is to be regarded as an adjudication merely that Cochran and Fullmore's possession of the vessel was sufficient, under the maritime law, to give Lamb & Co. a lien for such sums as were advanced to them by Lamb & Co. for necessary repairs and supplies, then it must follow that such possession was also sufficiently lawful to enable Cochran and Fullmore to secure the advances in question by a provision in the charter-party to that effect. These advances never having been paid or tendered, the defendants were justified in settling their accounts with Lamb & Co. upon the basis of the right of the latter to the freight moneys.

IV. The freight moneys received by the defendants were received under the charter-party, which was a contract between the master, acting for the owners, and the defendants, and it was the duty of the defendants to pay that money over according to the terms of that contract; and if the plaintiffs had any interest in those moneys, there being no privity between them and the defendants, it was their duty not merely to give a notice to the defendants, but to protect them by an injunction order proceeding, to which Lamb & Co. were parties; and defendants were justified, in the absence of such proceeding, in settling their accounts with Lamb & Co. on the basis of the right of the latter to the freight moneys in question.

V. No action can be maintained by the plaintiffs to recover freight money, under or in pursuance of a contract therefor, made by parties who, as they allege, had fraudulently obtained possession of the vessel.

VI. The action is founded upon the contract made by the parties alleged to be unlawfully in possession, and can be maintained, if at all, only upon the theory of an affirmation or ratification by the plaintiffs of the

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entire contract, including the provision securing Lamb & Co. for the advances made by them.

VII. Assuming all the allegations of fraud alleged by the plaintiffs in reference to the condemnation and sale at St. Thomas, they are estopped from setting up the invalidity of the sale, because they ratified and confirmed it by the acceptance of the net proceeds of the vessel, with the knowledge of the facts constituting the alleged fraud (See opinion of BLATCHFORD, J.).

VIII. The plaintiffs are also estopped from setting up the invalidity of the sale at St. Thomas, because they ratified and confirmed the same, not only by the acceptance and retention of the net proceeds of the vessel, but by their acceptance and retention of the insurance moneys, and also by the arrangement under which they obtained possession of the vessel from the parties who purchased her at St. Thomas (See opinion of BLATCHFORD, J.). Harris admits the receipt of the insurance moneys; that the papers which he received from St. Thomas were the basis of his claim against the underwriters, and that when he did so the proceedings in St. Thomas were not satisfactory; he believed that there was a fraud, and he had an affidavit to that effect made by Monroe, the mate; and that with full knowledge of the facts communicated by Monroe, and also by Jollymour, with whom he had two interviews, he made his claim upon the company, and obtained from them the insurance. See, also, evidence as to the collusive arrangement by which plaintiffs obtained possession of the vessel.

IX. By these acts, the plaintiffs are not only estopped from setting up, as against Lamb & Co., the invalidity of the sale or proceedings at St. Thomas, but they affirmed and ratified such sale, and made good, if otherwise defective, the title of Fullmore and Cochran to the vessel; and the rights of Lamb & Co. are to be determined upon the basis that Fullmore and

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Cochran were the actual and legal owners of the vessel at the time the advances were made.

X. Plaintiffs, having claimed and recovered against the insurance company as for a constructive total loss, must be held to have abandoned the vessel to the underwriters, and by reason of such abandonment, they parted with and became divested of all title and ownership which they had in the vessel, and cannot, therefore, recover for the freight money subsequently earned (3 *Kent's Com.* 319).

XI. If, however, the question of the validity of the proceedings at St. Thomas for the condemnation and sale of the vessel, is to be considered in the present action, then the verdict was not only clearly against the weight of evidence, but a verdict should have been directed in favor of the defendants. The evidence shows that the vessel arrived at St. Thomas in distress, and that the sale of the vessel by the master was within the well settled rules of the maritime law. In cases of necessity happening during a voyage, the master is by law created agent for the benefit of all concerned, and his acts, done under such circumstances, in the exercise of a sound discretion, are binding upon all parties in interest (*Jordan v. Warren Ins. Co.*, 1 *Story C. Ct.* 342 ; *Miston v. Lord*, 1 *Blatchf.* 354 ; *The Amelie*, 6 *Wall.* 18 ; *The Glasgow*, 1 *Swabey*, 150 ; *The Australia*, *Id.* 484 ; *The Margaret Mitchell*, *Id.* 382 ; *Gordon v. Massachusetts Fire and Marine Ins. Co.*, 2 *Pick.* 264). It may be added that the cases uniformly hold, that where the expense of repairing a vessel will exceed her value, the master is justified in selling. The undisputed evidence in the case, and the decree in the admiralty suit, establish that the sums expended for necessary repairs at St. Thomas were nearly double what the brig, &c., realized on the sale. It is to be presumed that this was the full value. The evidence on the subject of the sale confirms this pre-

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sumption. The court below conceded the fairness of the sale, and there being nothing to show that the brig did not, on the sale, realize its full value, we have, on these undisputed facts, a case made out which justified the sale in question.

XII. The verdict, however, was at all events so clearly against the weight of evidence, that it should be set aside.

E. D. McCarthy, attorney, and of counsel, for respondents, urged :—I. The plaintiffs were the sole owners of the freight money which she earned (*The Henry, Blatch. & Howland*, 465).

II. The proceedings of condemnation and sale at St. Thomas were fraudulent and illegal. They gave no authority to the purchasers there, to make any contracts on account of the vessel. This proposition is established by the decree of the admiralty court, and by the verdict of the jury in this court.

III. Our ownership being established and the freight having been collected by defendants, if they paid it to strangers, they did so at their peril; especially if we told them not to pay it. We did tell them not to pay it, on June 19, 1871, a few days after the vessel had completed her voyage. And defendants did not pay over this money; they still hold it.

IV. Defendants, among other things, requested the court to charge: "That plaintiffs, having claimed and recovered against the insurance company under their policy as for a total loss, must be held to have abandoned the vessel to the underwriters, and by reason of said abandonment, they parted with and became divested of all title and ownership which they may have had in the vessel, and cannot therefore recover for freight moneys subsequently earned" (*Page v. Millett*, 38 *N. Y.* 31; *Brazill v. Isham*, 12 *Id.* 17). This request is valueless, because defendants did

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not plead that the plaintiffs were not the real parties in interest. It also assumes a fact, which does not exist, that plaintiffs had abandoned their vessel. Neither is it true that plaintiffs collected for a total loss. The amount which they collected from the insurers was less than the sum they afterwards paid to Seamen and others upon the restitution of their vessel. And what was collected from the insurers, was paid after a full statement of facts had been made, so far as they were known. Whether or not the insurers could now recover from the insured the sum paid, because it was paid under a mistake of fact, is a different question to that suggested by the defendants' request. That the insurers could now treat the vessel as their property, when no abandonment was made nor any demanded—when, indeed, they told Mr. Harris that he could try to recover his vessel if he liked, but that they would not help him, I hardly need deny. But it is no business of defendants, anyhow; they do not plead that plaintiffs are not the real parties in interest (*Savage v. Corn Exchange Ins. Co.*, 4 *Bosw.* 2). Moreover, the insurance company are bound by the decree of restitution. A decree *in rem* is binding upon all persons.

V. As to the defense of former adjudication. On June 5, 1871, James D. Lamb & Co., of St. Thomas, libelled our vessel in the port of New York, for supplies and repairs furnished her at St. Thomas. She had just completed the voyage on which this freight money had been earned. These plaintiffs answered the libel and claimed the vessel, setting up the fraudulent condemnation and sale of her, at St. Thomas, as a defense to the libel. The decision of the court expressly waived the question of fraud and illegality suggested by the answer, on the ground that the vessel was liable for libellant's betterments upon her, anyhow. Afterwards judgment was given in favor of libellants,

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in the sum of \$365.90. The court expressly refused to adjudicate upon the freight money, which is the subject of the present action. It will be observed that the libel aforesaid was filed against the *vessel*, and not against the *freight* which she had earned. There was no former adjudication of this cause of action, because, (1) The proceedings in admiralty were not had between the same parties as are before this court. To be sure, a decree *in rem* is binding upon all persons who are interested in the *res* attached; but these defendants were not interested in any manner in the brig "Sarah Harris," or in the lien which the libellants then claimed to have upon her. They would not have been bound by any decree which the court might have entered, nor could they have appealed from it. In a word, the defendants were neither parties nor privies to the parties before the admiralty court. And since they were not bound by the admiralty decree, they can take no advantage from it. The advantages or disadvantages of the defense "*res adjudicata*" are mutual (*Greenleaf*, §§ 523-4 [8th Ed.]). (2) The proceedings in admiralty did not concern the same subject. Neither did they involve or in any manner concern the same state of facts. James D. Lamb & Co. there sought to enforce a lien upon the brig "Sarah Harris," for supplies which they had given to her. The *vessel*, not her *freight*, subsequently earned, was the *res* proceeded against. The cause of action was for goods sold and delivered upon her credit. By no decree made in that proceeding could the freight money, afterwards earned by her, have been affected. And so the court held. While a court of admiralty may decree against a vessel for supplies furnished her in a foreign port, no decree could be made against freight money in any proceeding whatever. This would be true, though the freight was pending at the time the supplies were furnished. (3) We can go one step further: If James D. Lamb

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& Co. were defendants herein, instead of Burdett and Pond, this defense would not avail them. Whatever claim Lamb & Co. had for any cause of action yet pleaded by them, has been merged in a judgment. Can there be two judgments for one cause of action? Lamb & Co. obtained a judgment in a court of competent jurisdiction, for \$365.90, because of supplies furnished to the brig "Sarah Harris." Would they be permitted to retain also, upon the same claim, the sum of \$2,000 more? Certainly, argument cannot much enlighten this proposition. Assume that Mr. Cochrane was in lawful command of our vessel, and had authority to assign over to Lamb & Co. her freight moneys (this assumption is against the finding of the jury in this case, as well as the decree of the admiralty court, which adjudged Mr. Cochrane an unlawful purchaser), still Lamb & Co. would be none the better off. They chose to take nothing by this assignment of Cochrane; they proceeded rather against the vessel; they now have a judgment and their claim satisfied. It is difficult to see on what firmer ground these defendants stand. They are not even in privity to Lamb & Co. I submit, in conclusion, that the only question involved on the trial below, was the ownership of the vessel. When that question was decided in plaintiffs' favor, this case was also decided in their favor.

BY THE COURT.—SANFORD, J.—The defendants attempted to set up in their answer, by way of affirmative defense to the plaintiffs' alleged cause of action, a former adjudication by the district court of the United States, of the respective claims of the plaintiffs and of James D. and William C. Lamb, to the freight money now in controversy. The allegations of the answer as to such adjudication are insufficient to constitute a defense; and the proofs adduced in support of them

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show conclusively that no adjudication with respect to such freight money was made by that court.

It is manifest from the allegations of the answer that the decree of the district court therein referred to was interlocutory merely, and not final ; and that it only purported to adjudicate upon the right of the libellants, Lamb & Co., to a lien upon the "Sarah Harris," for the amount of their advances to and for the use of said vessel, without passing upon the right of the respondent Harris to have the freight money, subsequently earned by the vessel, credited upon such advances. It is equally clear that neither the insertion in such decree of a clause referring it to a commissioner to ascertain and report the amount of such freight money, nor the report of such commissioner to the court, stating the amount thereof, constitutes a final and conclusive adjudication. To such an adjudication, the confirmation of the report and the rendition of a decree thereon are absolutely essential. The answer contains no averment that the report was ever confirmed, or that a final decree was ever rendered.

But an inspection of such interlocutory decree, as it appears in evidence, discloses the fact that all questions in regard to freight money were thereby expressly reserved until the coming in of such report ; and it appears from the record of the final decree, actually rendered thereon, and from the opinion of the court which accompanied it, that inasmuch as the libel was filed only against the vessel, and not against freight money, and as the freight money had not been attached on process, the court could make no adjudication with respect to it, in that suit ; and that accordingly, none such was made. These observations effectually dispose of the question of a former adjudication, as a separate and distinct defense to the action.

But the case presents other issues, upon which *as evidence*, the judgment of the United States district

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court has an important bearing. To maintain their action it was essential that the plaintiffs should aver, as in their complaint they did aver, that at the time of the shipment of the cargo, for the transportation whereof they now claim to recover freight, they were the owners of the Sarah Harris. This allegation the defendants, by their answer, deny; averring, on the contrary, that at the time of such shipment, the Sarah Harris was chartered by Terence Cochran, who was then master and part owner of the said vessel, to the firm of Lamb, Storer & Gad, to proceed on a voyage to the port of New York, with a cargo consigned to defendants; that the freight to be earned on said voyage, under said charter-party, was by the then master and part owner of said vessel, assigned and transferred to the firm of James D. and William C. Lamb, as security for advances made by them, to and for the use of said vessel, and that a provision was inserted in said charter by which said freight was made payable to the order of said Lamb & Co.; and that the freight on said cargo was, in accordance therewith, on the delivery of said cargo, or soon thereafter, and long before the commencement of this action or any claim or notice of claim on the part of the plaintiffs, paid to the said Lamb & Co.

On the trial, the plaintiffs having adduced evidence tending to establish, *prima facie*, their ownership of the vessel, the defendants read in evidence depositions and documents, from which it appeared that the brig Sarah Harris, then owned by the plaintiffs, arrived at St. Thomas, in distress, on or about January 23, 1871, in command of James Jollymour, master, who on that day, made written application at the British consulate for a warrant of survey on said vessel, which was thereupon granted. Report having been made thereon recommending the discharge of cargo, for a further examination of the vessel, and the cargo having been

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discharged pursuant thereto, a second application was made by the master for the appointment of surveyors. Further proceedings were thereupon had, which finally resulted in the sale of both vessel and cargo, on the ground that the vessel was not worth the cost of necessary repairs, and that the interest of all concerned required that such sale should be made. Terence Cochran and James F. Fulmore purchased the vessel at such sale.

On February 23, 1871, Terence Cochran made formal declaration of ownership, for the registry of said vessel under the British registry acts, declaring himself entitled to be registered as owner of forty-two shares, the other joint owner being James F. Fullmore, for the remaining twenty-two shares. On April 16, 1871, the vessel was chartered by Terence Cochran, as master and agent for owners, to Lamb, Storer and Gad, the charter containing provisions substantially as alleged in defendant's answer, and particularly, to the effect that the freight should be paid to the order of Lamb & Co., as security for cash advances, and, in case of protest or non-payment, of Cochran's draft on London, being the draft of £400, remitted by Lamb & Co. to the plaintiffs. The draft was duly protested, and Cochran had notice thereof, before leaving Humacoa. There was no dispute as to the fact or the regularity of such proceedings; but their necessity, honesty, and good faith was hotly contested, and much testimony was offered, on both sides, bearing upon the question of their validity as fraudulent or otherwise.

The defendants have never disputed their liability as consignees of the cargo, for the freight payable thereon, but they insist, that by reason of the sale above set forth, and the provisions of the charter, under which such freight was earned, Lamb & Co., and not the plaintiffs, were entitled to receive payment

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from them ; they also insist, that before the commencement of this action, and before any claim was made, on the part of the plaintiffs, or notice to them of the rights or claims of the plaintiffs, they did, in fact, pay it to Lamb & Co. There being no imputation upon them of any fraud or collusion, such payment, if made in good faith, without knowledge or notice of plaintiffs' claims, would, doubtless, exonerate them from further liability, irrespective of the question whether the sale at St. Thomas, or the proceedings preliminary thereto, were or were not fraudulent and void. But the question as to whether such payment was made by them before receiving notice of plaintiffs' claims was submitted to the jury upon conflicting evidence, and the jury found in favor of the plaintiffs. Without stating, in detail, the evidence upon this point, it is sufficient to say that it fully sustains the finding.

It must, therefore, for the purposes of this appeal, be assumed, as the jury found, that the defendants had not paid over to Lamb & Co., but had in hand, the freight money in question, when they received notice of the plaintiffs' claims. Of course, any subsequent payment of it would be at their peril. It was then competent for them, at their option, to interplead the two adverse claimants, and thus, on paying the money into court, to secure their exoneration from further liability to either,—or, they could, if they saw fit, rely upon the title of either, as against the other. The latter alternative they seem to have adopted, and the question is thus presented, whether the title of the plaintiffs was divested by the condemnation and sale of the vessel, at St. Thomas ; or, incidentally, whether the plaintiffs, as against Lamb & Co., whose title the defendants assert, are in any way estopped from disputing the validity of such sale. The defendants insist that such sale was regular and fair ; that under it Cochran and Fulmore acquired valid title to the

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vessel, and became alone authorized to enter into contracts for its charter and affreightment; that by valid assignment from them, evidenced by the charter-party between Cochran and Lamb, Storer & Gad, Lamb & Co. became entitled to the freight money, now in controversy, as security for the payment of their advances, and in case of protest, of Cochran's draft; and that, by receiving and retaining the proceeds of the vessel and cargo realized at such sale, as well as by accepting from underwriters the insurance money payable in case of the loss of the vessel, the plaintiffs have estopped themselves from asserting their title thereto, and from disputing the validity of such sale.

The exception taken by defendants to the refusal of the judge to direct a verdict in their favor distinctly raises the question of such estoppel, and it is by way of evidence bearing upon that question that the decree rendered in the district court of the United States, in the suit of Lamb & Co. against the "Sarah Harris," in which the plaintiffs intervened, becomes of prime importance. If the plaintiffs were estopped, either by receiving and retaining the proceeds of the vessel, or by accepting the insurance money, from subsequently asserting title to her, as against Lamb & Co., the judge erred in submitting to the jury the question of the honesty and validity of the proceedings under which such sale was effected, and in not directing a verdict for the defendants in compliance with their request; and if the question of such estoppel has been distinctly and decisively adjudicated by the district court of the United States in the suit above referred to, its decree is conclusive, and it is not within the province of this court to review its decision, or to entertain the same question, *de novo* (Birckhead v. Brown, 5 Sandf. 134). After a careful perusal and examination of the record of the proceedings in that suit, as they appear in evidence, I have arrived at the conclusion that the decree does involve an

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adjudication of these very questions of estoppel. It is true that the subject-matter of that suit is not the same as in this ; that the libellants there were proceeding against the vessel for advances and supplies, not against the freight earned by her ; and that the freight so earned, not having been attached by any process issued in that suit, was not within the jurisdiction of the court. Indeed, it was expressly held in that suit, as has already been stated, that no adjudication with respect to such freight moneys could be made therein. It is also true, that the question of the validity or invalidity of the sale under the proceedings had at St. Thomas was not considered or determined. But the judge before whom the trial of that suit was had, did decide that the claimant, John Harris, representing the plaintiffs here, was estopped, as against the libellants, Lamb & Co., from setting up the invalidity of such sale, because he ratified and affirmed it by his acceptance of the insurance money and by his acceptance and retention of the entire net proceeds of the sale of the vessel, when such proceeds were sent to him by the libellants. He accordingly held that the vessel must be regarded, for the purposes of that suit, as lawfully in the possession of those who actually controlled her, at St. Thomas, when the libellants furnished money there for supplies and repairs to her. Such lawful possession was an essential element in the adjudication thereupon rendered in favor of the libellants, establishing a lien in their favor, on the vessel, for the moneys they advanced or disbursed to her master, Terence Cochran, at St. Thomas, for repairing, supplying, and refitting her. Such an adjudication could not have been rendered, under the maritime law, unless either the sale had been declared valid and effectual, or such estoppel had been successfully invoked and sustained. A material question, therefore, upon which the right of the plaintiffs to recover in this action the freight earned by

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the Sarah Harris depends, was determined against them in that suit. Had it been determined by the decree there rendered that the sale and all the proceedings preliminary thereto, were fair, honest and untainted by any suspicion of fraud, and that the sale was accordingly valid and effectual, no one would be heard to contend, that as between the plaintiffs and Lamb & Co., such an adjudication would not bar a recovery of freight money assigned or made payable to them by the purchasers at the sale, or by the duly constituted agent of such purchasers. It is difficult to perceive any difference, in principle or effect, between such an adjudication, and one which declares the plaintiffs estopped by their own acts or admissions from disputing the validity of such sale. The case of *Birckhead v. Brown*, above cited, is authority for the proposition that "as between the parties and their privies, a judgment is conclusive as to every question, upon which the right of the plaintiff to recover, or the validity of a defense, in another suit, is found to depend, and upon the determination of which it appears from the record, or is shown by extrinsic proof, that the judgment was, in reality, founded. So long as such judgment remains in force, the parties to it and their privies are estopped from denying either the facts or the law upon which it proceeds.

Without expressing any opinion, therefore, as to whether the receipt by plaintiffs from Lamb & Co., of the proceeds of vessel and cargo, or their receipt from underwriters of the amount of the policy of insurance upon the vessel, did or did not constitute an estoppel, a question as to which the district court of the United States and the court below are at variance, I am of opinion that the court below should have accepted as *res adjudicata*, and therefore conclusive, the decision of the district court upon that question, and should not have submitted to the jury the question

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of the honesty or dishonesty of the sale, and proceedings preliminary thereto. Of course, if that question was conclusively determined in favor of defendants by a former adjudication, this action could not be maintained. There was, therefore, in such case, no occasion for submitting to the jury the question as to whether payment was made by defendants to Lamb & Co. before notice of plaintiffs' claims. The defendants were entitled to a peremptory instruction to the jury, to find a verdict in their favor, and for error in refusing such instruction, the judgment must be reversed, and a new trial ordered, with costs to abide the event.

CURTIS, Ch. J., and FREEDMAN, J., concurred.*

* The plaintiffs appealed to the court of appeals, from the order entered on this decision, giving the requisite stipulation. Thereafter, upon plaintiffs' motion, the general term inserted in its order a statement that the judgment was reversed and a new trial ordered *on questions of law* solely. Thereafter, on motion of plaintiffs, this order was made the order of the court of appeals. Thereafter defendants moved to dismiss the appeal of the plaintiffs to that court. That court denied the motion.

The opinion of the court of appeals seemed to the reporters to be so important to the profession as to render it advisable that it should be reported as early as practicable; they therefore obtained the kind permission of Mr. Sickles, the court of appeals reporter, to report it.

The opinion is as follows:

RAPALLO, J.—On the trial, this case was submitted to the jury on the question of fact, whether certain proceedings at St. Thomas, by which the vessel of the plaintiff was condemned and sold, were honest and fair, or were fraudulent. The jury found for the plaintiffs, and the effect of the verdict was to establish the fraud charged. The facts were controverted.

The defendants moved upon the minutes for a new trial on the ground of the insufficiency of the evidence. The motion was denied and judgment entered on the verdict, and an appeal was taken to the general term from the order denying a new trial, and also from the judgment.

On these appeals the general term reversed the judgment and ordered a new trial. From the opinion it appears that the reversal

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was upon the sole ground that a certain decree in admiralty in New York was conclusive upon the plaintiffs as to the validity of the sale at St. Thomas, and a bar to this action.

The question whether the evidence was sufficient to sustain the finding of the jury that the sale at St. Thomas was fraudulent, was not considered in the opinion, and the court below has inserted in its order of reversal a statement that the reversal was on questions of law only.

The plaintiffs have appealed to this court, and the defendants now move to dismiss the appeal.

We have repeatedly held that an appeal to this court will not be entertained where the court below has ordered a new trial in a case tried by jury, if any material and controverted question of fact was involved, and the general term granted, or might have granted, the new trial on such question of fact. But as considerable misapprehension seems still to exist as to the application of this rule, we will further explain it and the reasons upon which it is founded.

It appears to be supposed by many that the appealability of the order depends upon the question, whether the new trial was actually granted upon questions of fact or of law, and that the declaration of the court below that its decision was based upon questions of law only, is sufficient to render the case appealable. But this is an error. In the first place, we have often held that we will not regard the opinion as conclusive, inasmuch as the result may have been concurred in by some of the judges on their view of the facts, and there is no authority of law for inserting the ground of reversal in the order, as in the case of trials before the court or a referee; that it is incumbent upon the appellant to show error in the decision appealed from, and that an order granting a new trial is not shown to be erroneous, by showing that there was no valid exception in the case, provided it was in such a condition that the general term could have reversed upon the facts.

But aside from these technical grounds there are still more substantial reasons for the rule. Assuming that the court did actually grant the new trial on a question of law, and that this can be made conclusively to appear; yet, if the case came before the general term in such form, and the character of the evidence was such that a new trial might have been granted on questions of fact, the order is not appealable to this court, and should not be. To hold otherwise might result in entirely depriving the party against whom the judgment was rendered of the review at general term upon the facts to which the law entitles him.

The present case affords a good illustration. Suppose this court

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should differ with the general term upon the question of law on which its order for a new trial was founded, what judgment should we render? If we should reverse the order, the consequence would be an affirmance of the judgment entered on the verdict, and in that event the defendants would have a final judgment against them on the ground that the sale at St. Thomas was fraudulent in fact, without having had any review of the verdict, by the general term, upon the evidence, notwithstanding that the law gave them the right to such review, and that they had taken all the steps required to obtain it.

If the general term had not been of the opinion that the decree in admiralty was a legal bar to the action, it would beyond doubt have proceeded to perform its duty of examining the question of fact, and might have reversed the judgment and granted a new trial on the ground that the verdict was against the weight of evidence. By the appeal from the order denying the motion for a new trial on the minutes, the questions of fact were brought legitimately before the general term, and it must be presumed that it would have passed upon them had it not been of opinion that the point of law required a review of the judgment. If under such circumstances this court should finally dispose of cases on appeal from orders granting new trials, it is evident that a mistake by a general term in respect to a question of law, would result in entirely depriving the party against whom the judgment was rendered of any review of the verdict upon the evidence. On these grounds we have repeatedly declined to entertain such appeals.

It may be suggested, that this court could hear the appeal, and if it overruled the point of law upon which the new trial was granted, the case might be sent back to be reheard at general term upon the facts, but there is no precedent for such a practice, it is liable to grave objections, and would be an innovation which we are not inclined to introduce.

Where exceptions have been taken, and a motion for a new trial has also been made upon the minutes or at special term, the unsuccessful party may waive any further review upon the facts, and appeal to the general term from the judgment. This appeal will bring up the exceptions only, or where an appeal is taken from the order refusing a new trial, as well as from the judgment, the general term may reverse the judgment upon the exceptions, and at the same time affirm the order refusing a new trial upon the facts.

In either of the cases supposed the order of the general term is appealable. But in no other case will such an appeal lie, in a case tried by a jury, if controverted and material questions of fact are involved, and a motion for a new trial has been made on the evidence.

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The inconvenience and expense of going back for a new trial, when the case may ultimately turn upon the question of law, is invariably urged upon the court in cases of this description; but it must not be overlooked, that the inconvenience complained of is not nearly so great a hardship, as would be inflicted by rendering a final judgment against a party upon a verdict which may have been rendered contrary to the weight of the evidence, and which would have been set aside by the court at general term had it not rested its order granting a new trial upon an erroneous view of the law. It must also be remembered that orders granting new trials are not final orders, and were in no case appealable to this court until the amendment of the Code, adopted in 1857. The purpose of this amendment was to obviate the inconvenience now alluded to; but the right of appeal was confined, as we have often decided, to cases depending upon questions of law, except where the trial was before a court or referee. We cannot extend it to cases tried before a jury where questions of fact as well as law are involved.

In the present case the appellants contend that, although on the trial the case was submitted to the jury, and determined, on a controverted question of fact, yet such question of fact was immaterial; that even if the general term had been of opinion that the verdict on that question was against the weight of the evidence the plaintiffs were nevertheless entitled to judgment upon the uncontroverted facts, unless the decision of the general term upon the question of law can be sustained.

If they can make this out to the satisfaction of the court the order is doubtless appealable, for then no material question of fact is involved in the case, and a new trial would be of no avail. Its determination would depend wholly upon the question of law.

We have looked into the record to ascertain whether there is any color for this proposition. The appellants' counsel claims that the point should not be determined on a motion, but only on a full hearing, and in this we are inclined to concur with him and not now to decide the point against him unless it is plainly frivolous. Upon an inspection of the return we find that the case is quite voluminous and somewhat complicated, and that it would require an examination on the merits to decide the point. We have therefore concluded to hear the case, if the appellants desire to argue it in view of the intimation we have given.

If they elect to proceed with the appeal, it will be incumbent upon them to establish that the case is such that they can abandon the finding of the jury, and that they were legally entitled to have a verdict directed in their favor. But if the question of fact upon which

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the jury passed turns out to have been material, the appeal will still have to be dismissed, and the appellants incur the further hazard, that if any material exception taken at the trial turns out to have been well founded, whether passed upon in the opinion at general term or not, the order may be affirmed and judgment absolute rendered against the plaintiffs in pursuance of their stipulation.

Unless the appellants consent to a dismissal of the appeal the motion is denied, but without costs.

All concur.

Opinion of the Court, by SANFORD, J.

**BENJAMIN DIETZ, PLAINTIFF AND APPELLANT,
v. JOHN J. FARISH, DEFENDANT AND RES-
PONDENT.**

I. COURT OF RECORD.

**1. POWER OVER PROCEEDINGS IN ACTIONS PENDING
THEREIN.**

(a) *Has inherent power, irrespective of statutory provisions, to modify or vacate and set aside its own orders, judgments, and proceedings, in its discretion.*

1. **IN WHOSE BEHALF EXERCISED.** May be exercised in behalf of the party by whom and in whose favor the order or judgment was entered, or the proceeding had.

2. Example.

(a) **SETTING ASIDE TAXATION OF COSTS SO AS TO ALLOW A
MOTION FOR AN EXTRA ALLOWANCE TO BE MADE.**

1. On motion of the party who inadvertently taxed his costs the court set aside the taxation *so as to remove an objection theretofore made under general rule 56* to a motion made by him for an extra allowance.

Before SEDGWICK and SANFORD, JJ.

Decided November 5, 1877.

Sigismund Kaufman, attorney, and Lewis Sanders, of counsel, for appellant.

Shipman, Barlow, Larocque & MacFarland, attorneys, and Sol. Hanford, of counsel, for respondent.

BY THE COURT.—SANFORD, J.—This is an appeal from an order vacating the taxation of costs in the cause at the instance of the defendant, in order to enable him to obviate the objection to his motion for an extra allowance. founded on rule 56 of the general rules,—which

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provides that applications for such allowances shall, in all cases, be made before final costs are adjusted. It appears by affidavit, that the bill of costs was prematurely presented to the clerk for adjustment, "through inadvertence." Under section 174 of the Code of Procedure, it was competent for the court, in its discretion, to relieve a party from a judgment, order, or other proceeding taken against him through his inadvertence or excusable neglect; and this provision has been held to authorize the relief of a party from a judgment entered in his favor (*Montgomery v. Ellis*, 6 *How.* 326.) But, irrespective of the authority conferred by this section, the power of a court of record to modify, vacate, and set aside its own orders, judgments and proceedings, in its discretion, is too well established to admit of question. "*All the proceedings in an action are under the control and subject to the direction of the court, so long as the action is pending*" (*Barry v. Mutual Life Insurance Company*, 53 *N. Y.* 536). In the case last cited, an order entered upon an express stipulation in writing, signed by the attorneys for the respective parties, was vacated on the ground that the stipulation had been inadvertently or improvidently executed. The court of appeals held, that all stipulations and agreements between parties to an action and affecting proceedings in it, were within the control of the court in which it was pending, and might be set aside in the discretion of the court, whenever the parties could be restored to the condition in which they would have been, if no agreement had been made. The order now appealed from, restored the parties to this suit to precisely the position in which they would have stood, had no adjustment of costs been made, and enabled an application, resting in discretion, to be heard on its merits, notwithstanding a purely technical objection to such hearing, interposed by way of estoppel. We are of opinion that the order appealed

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from was in the discretion of the court, and was properly made.

The appeal should be dismissed, with costs.

SEDGWICK, J., concurred.

IN THE MATTER OF THE PETITION OF ROSWELL D. HATCH.

I. *Grades of streets, changing of.*

1. AWARDS FOR, TITLE THERETO DISPUTED.

(a) JURISDICTION OF SUPERIOR COURT AS TO.

1. The court, under chapter 52 of the laws of 1852, has *no jurisdiction upon petition*, to determine a disputed title, and direct payment to one of the claimants.

1. Such determination can only be by due process of law, at least in this court.

2. The authority given by the phrase "to be secured, *disposed of*, and improved as the superior court shall direct," is simply a supervisory one over the chamberlain, with respect to his custody, care, management, and investment of the fund while it is in his hands, and *does not authorize* its withdrawal from him.

II. *Definitions.*

1. DUE PROCESS OF LAW.

It means a suit instituted and conducted in accordance with the prescribed course of procedure, for determining the title to property.

Before SEDGWICK and SANFORD, JJ.

Decided November 5, 1877.

The petitioner claims that he is entitled to receive an award for damages to certain premises, made by the assessors on changing the grade of Manhattan street. The award is \$1,560, and the petitioner claims

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it upon the ground that he was the owner of the premises damaged at the time of the injury.

One John J. Bowes claims to be entitled to the award as the owner of the premises when the change of grade was completed.

The mayor, aldermen, and commonalty claim to be entitled to \$1,223.61 of the award of \$1,560, being the assessment on the premises for the expenses of the improvement in question.

The petitioner procured an order directing the comptroller to pay the award to the city chamberlain, and a reference to take proofs, to the end that the court determine the title of the claimants and of the petitioner and direct the payment of the award to the party entitled to receive it.

The petitioner based his application for this remedy upon a provision in chap. 52, § 4, *Laws of 1852*, providing that where the title to the award is disputed it shall be lawful for the city to pay the same to the "chamberlain of the city of New York to be secured, disposed of and improved as the superior court shall direct, and such payment shall be as valid and effectual in all respects as if made to the said owners, parties, &c." The act further provides that notice of such payment to the chamberlain shall be forthwith given to the superior court. This provision in the act of 1852 is referred to and confirmed. See *Laws 1867*, p. 1750.

The referee reported in favor of the city for the amount of its claim, and that the remainder of the award after satisfying the claim of the city be paid to the claimant John J. Bowes.

Thereupon said Bowes moved, on notice to the petitioner and the Mayor, &c., for a confirmation of the report.

The court at special term dismissed the application for want of jurisdiction.

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The opinion delivered at special term was as follows :

CURTIS, J.—It has not been shown to me satisfactorily that this court has the power to order the payment of this award and grant this summary species of relief as sought for in this proceeding. During the interval of more than twenty-five years since the passage of the act, it is not shown to have ever in a single instance attempted to exercise such power. The constitution provides that no person shall be deprived of property *without due process of law*. Private property cannot be taken from one person and delivered to another person or applied to the private use of another, except by a suit instituted and conducted in accordance with the prescribed course of procedure for determining the title to property. The institution and conduct of such a suit is what is meant by “due process of law.” The title to the property in question, this award of \$1,560, is sought to be determined by a proceeding unknown to the common law. A conflicting claimant, and possibly the rightful owner of this sum, thus held, is liable to be deprived of it without the advantage of a suit or proceeding where his rights can be passed upon by a jury or asserted on appeal.

Moreover, it is not shown that this mode of practice by petition and order is, as far as this court is concerned, authorized by the legislature (*Taylor v. Porter, Hill*, 147 ; *In re Dodd*, 27 N. Y. 632).

The case here is different from what it may be in the supreme court, which is clothed with the jurisdiction of proceedings for opening and improving streets.

Where the parties and the proceedings are before that court, and these questions arise in applications in their nature interlocutory and in respect to which there is no question of jurisdiction, this mode of remedy may exist.

But this court, a stranger to this species of juris-

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diction, cannot properly undertake to determine questions of title to property between private parties, except in accordance with such process of law as is known to the administration of justice, and which preserves to suitors the authorized and constitutional modes of asserting and protecting their rights.

The application to the court, in this matter, must be dismissed for want of jurisdiction.

Thereupon an order was made dismissing the petition.

From this order said Bowes appealed.

William Marsh, attorney, and *John D. MacGregor*, of counsel, for appellant, urged :—I. The statute (*Laws of 1852*, chap. 52, § 4) which authorizes the award, directs that when the title to it is “disputed, it shall be lawful for the mayor, aldermen, and commonalty of the city of New York to pay ‘the money’ to the chamberlain . . . to be secured, disposed of, and improved as the superior court shall direct.” This language is clear and positive, free from obscurity or ambiguity, and being the language of the legislature, is ample to confer the jurisdiction asked for in this case. 1. It is not obnoxious to the constitutional inhibition that it deprives any one of property, without due process of law. The award is not “property” in the constitutional sense ; it is a mere gratuity returned by the State for the exercise of its right of eminent domain, and there are no precedents in the common law applicable to it. The same statute which gives the gratuity has a right to prescribe the modes of its payment. The case is analogous to a pension or bounty, granted by the government, which is governed by the act itself, and does not come within the ordinary laws of descent or distribution. It might as well be contended that the act is unconstitutional in respect to the assessments, because it deprives the party assessed of

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his property without trial by jury. The constitutional provision has never been extended beyond rights which were known to the common law. 2. If any inference is to be derived from the fact that the provision was enacted twenty-five years ago, and that no attempt has ever been made to enforce it, it is quite as logical to say that during that period, in the repeated compilations of the laws relative to the city of New York, by the common council, by Judge Davis, Judge Hoffman, and others, this important provision has never before been questioned. The order should therefore be reversed, and the special term directed to hear the motion to confirm the report on the merits.

II. If, however, this court had no authority to determine the title to the award, it had jurisdiction to direct how it should be "secured and improved." This is authority enough to enable the court to award costs against the petitioner when he has asked for relief which is refused. The petitioner Hatch comes voluntarily into court and brings the other parties here. He has submitted himself to its jurisdiction on him, so far as that jurisdiction may extend. This court certainly had some authority in this proceeding. It is a court of general jurisdiction in law and equity, and possesses the power to make a complete disposition of whatever proceeding is brought before it. This power embraces the right to impose costs upon the dismissal of a proceeding for want of jurisdiction against the party who has unwarrantably instituted it. "On dismissal of an action for want of jurisdiction to hear and determine it on its merits, the defendant is entitled to a judgment against the plaintiff for costs" (*McMahon v. Mutual Ben. Life Ins. Co.*, 3 *Bosw.* 644, approved; *Kings v. Poole*, 35 *Barb.* 248; *Brocket v. Bush*, 18 *Abb. Pr.* 337). The order should be amended by allowing the respondent his costs.

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James A. Deering, attorney, and of counsel, for respondent, Hatch.

Wm. C. Whitney, corporation counsel, and *Arthur Berry*, of counsel, for The Mayor, &c.

BY THE COURT.—SANFORD, J.—If the provision of chapter 52, section 4, of the *Laws of 1852*, which authorizes the payment by the corporation, to the chamberlain of the city of New York, of an award to unknown owners, “*to be secured, disposed of and improved* as the superior court shall direct,” can be construed as conferring jurisdiction upon this court, to determine the rights of adverse claimants to such award, and to direct the payment thereof to such party as shall be adjudged entitled thereto, the statute referred to is silent as to the mode in which such jurisdiction shall be exercised ; and we are not aware of any principle, authority, or precedent, upon which a proceeding for obtaining such an adjudication can be summarily instituted by *petition*, or otherwise than, in the ordinary course of practice, by civil action. The objections to such a summary exercise of jurisdiction are sufficiently indicated in the opinion which accompanied the order appealed from. But it will be observed that the words “disposed of,” as employed in the statute, and under which alone it can be insisted that the statute confers authority to direct payment to a claimant, are so connected with the words, “to be secured” and “improved,” as to leave little doubt that the legislature intended to confine the action of this court under the statute, to such disposition of the money, as, in its discretion, may be proper, only so long as the same remains in the hands of the chamberlain. If the disjunctive “or,” had been used instead of the copulative “and,” there would be some ground for supposing that the disposition of the fund intended

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might be deemed to include its withdrawal and payment; but when the authority conferred is in terms confined to a direction as to the securing, disposing of, *and* improving the fund, the maxim, *noscitur a sociis*, seems applicable, and we must, therefore, construe the language as importing only a supervisory authority over the chamberlain, with respect to his custody, care, management and investment of the fund, and not as authorizing its withdrawal from his hands.

On this ground, as well as on those suggested in the opinion of the learned chief justice, we think the court should decline to adjudicate upon the rights of claimants, in any such summary manner as is contemplated in this proceeding, and that the order appealed from should, accordingly, be affirmed.

SEDGWICK, J., concurred.

CHARLES W. MAY, PLAINTIFF AND APPELLANT,
ALSO RESPONDENT, v. JACOB R. SCHUYLER,
AND OTHERS, DEFENDANTS AND RESPONDENTS,
ALSO APPELLANTS.

I. *PRINCIPAL AND AGENT.*

1. AGENT TO SELL, WITH NO INTEREST IN THE SUBJECT OF SALE.

The dissenting opinion contains nothing adverse to the propositions in the head-notes. The difference of opinion between the learned judges arises from the conclusions of facts which they arrive at from the evidence.

The prevailing opinion proceeds on the ground that defendants had modified the terms of the letter of July 7, and had, through Mr.

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1. MODIFICATION OF TERMS OF EMPLOYMENT.

(a) WHEN IT MAY BE MADE. At any time before the agent has fully performed the service for which he was employed; or in case the principal has waived or prevented full performance, then at any time before substantial performance.

(b) EFFECT OF MODIFICATION AT SUCH TIME. The agent may decline to further act, or may make a new agreement with the principal as to the terms of his employment;

But,

if he does neither, and thereafter makes sales, such sales, and his compensation therefor, must be governed by the modified terms.

1. *Protest.* This although he protests against the modification.

2. AGENT OR BROKER TO SELL ON CERTAIN SPECIFIC TERMS, AND AGENT OR BROKER EMPLOYED GENERALLY TO FIND A PURCHASER.

1. COMPENSATION, WHEN EARNED.

(a) DISTINCTION BETWEEN.

1st. In the first case he must find a purchaser, ready and willing to complete the purchase on the terms specified.

2d. In the second case it is sufficient if he brings the parties together, and a sale results in consequence thereof.

3. ADMISSIONS BY PRINCIPAL TO THIRD PARTIES, EFFECT OF, AS EVIDENCE IN THE AGENT'S BEHALF.

1. A settlement, made by the principal with parties from whom he procured the goods which he had employed the agent to sell at certain prices, (the agent to receive all above such prices for his compensation,) on the basis and statement that he, the principal, was entitled to receive only those prices, is *not absolute proof* that the principal had not lawfully modified the original terms of the agent's employment so that he was, in fact, entitled to receive much higher prices than those he thus stated to the third party, on the faith and basis of which statement a settlement was made with such third party.

Reynolds, their duly authorized agent, notified the plaintiff of such modification before he had effected any sales under that letter.

The dissenting opinion proceeds on the ground that defendants had not, at any time before sales effected under the letter of July 9, changed, or communicated to plaintiff, or to Mr. Reynolds, any change in, the prices fixed by that letter.

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(a) *Contrary proved, effect.* When the plaintiff has himself proved the fact to be contrary to such settlement and statement, he cannot rely on the settlement and statement as countervailing his proof.

(b) *Wrong on the third party.* Although, on such a state of facts, the inference is that the third party was wronged, and is entitled to recover the difference, yet the agent has no right to hold on to that difference.

II. EVIDENCE.—ADMISSIONS.

Vide supra.

Before SEDGWICK, SPEIR, and FREEDMAN, JJ.

Decided November 7, 1877.

In this action, judgment was entered upon the report of a referee, in favor of the plaintiff, against the defendants, for \$37,077.56.

Both plaintiff and defendants appealed.

The plaintiff, by his complaint, alleged that on or about September 15, 1870, he procured for the defendants a sale to the French government of arms and military goods, at the aggregate price of \$286,937.93. That the same were sold under an arrangement that for his compensation the plaintiff should have the excess over certain prices which had been named to him in a letter of July 9, 1870, from the defendants. That such excess amounted to \$32,881.95; from which certain charges were to be deducted.

For a second cause of action, the plaintiff alleged that on or about October 26, 1870, he procured for the defendants a further sale to the French government of 5,250 Sharp's carbines and 2,000,000 cartridges, at the aggregate price of \$127,008.22. That such sale was procured under the same arrangement, and that the excess of the price over the sum named in the letter of July 9, 1870, was \$38,508.22, from which were to be deducted certain charges.

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For a third cause of action, the plaintiff alleged that he purchased from the defendants 1,320 Sharp's rifles, and 660,000 cartridges at the price named in the letter of July 9, 1870, amounting to \$33,000. That he sold them to the French government for \$38,086.13, which the defendants collected and received to his use, the excess being \$5,086.13, from which were to be deducted certain charges.

For a fourth cause of action, the plaintiff alleged that the defendants sold to the French government, on or about October 3, 1870, 5,000 Spencer carbines and 2,780,000 cartridges, at the price of \$206,378.31, and on or about November 1, 1870, 100 revolvers and 14,000 cartridges at the price of \$1,737.72 ; that the sale was procured by the plaintiff, and that for his services, he was entitled to the usual and customary commission of 5 per cent.

The plaintiff claimed that after deducting all the charges, and certain credits to which the defendants were entitled, there remained due to him \$56,954.01, for which, with interest from January 1, 1871, he asked judgment.

The defendants compose the well-known firm of Schuyler, Hartley & Graham, dealers in military goods.

The plaintiff, at the time in question, was a merchant doing business in Paris. He had been a partner, and subsequently, was the business correspondent in Paris of the defendants, doing business for them upon a commission of five per cent.

The defendants, by their answer, admitted their letter of July 9, 1870, but they denied that the plaintiff had made any sales under the arrangement therein proposed ; they further denied that the plaintiff had rendered any such services as he claimed.

For a further defense, the defendants alleged that on or about July 15, 1870, war was declared between

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France and Prussia. That in consequence and by reason also of correspondence between the defendants and the plaintiff, all arrangements made prior to the declaration of war had ceased, and that the sales claimed to have been procured by the plaintiff, were really made by one William W. Reynolds, an agent of the defendants, under an agreement to compensate him for services in aiding Reynolds, different to that claimed by the plaintiff.

The defendants claimed that pursuant to the terms of such new agreement, which the answer stated to have been made on September 27, 1870, the amounts which the plaintiff had received fully paid him.

The answer also set up several counter-claims, which were put in issue by plaintiff's reply. They have been abandoned upon his appeal, and hence it is not necessary to refer to them.

By his report the referee found: That about September 15, 1870, the plaintiff did effect for the defendants the sale alleged in the plaintiff's first cause of action, and upon the terms there alleged. The net amount to which the plaintiff thereby became entitled being \$24,208.11.

That on or about September 15, 1870, the defendants made to the plaintiff the sale mentioned in the plaintiff's third cause of action, and upon the terms there stated. That the goods were subsequently sold by the plaintiff to the French government. That the defendants received the proceeds, and that, after deducting all charges, the defendants thereby became indebted to the plaintiff in the sum of \$2,872.15.

That the plaintiff procured for the defendants the sales mentioned in the plaintiff's fourth cause of action. That he was entitled to a five per cent. commission thereon, and that the same amounted to \$10,405.80.

The referee further reported that the plaintiff had received from the defendants on account of their in-

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debtedness, in goods \$9,605.90, and a balance of \$2,885.50 of cash, consisting in the difference between \$7,223.24, received by the plaintiff to the credit of the defendants, and the sum of \$4,337.74 paid by him on their account.

Deducting those amounts from the sums reported in plaintiff's favor left \$24,994.66, for which, with interest, the referee reported in the plaintiff's favor.

The defendants excepted and appealed.

The referee disallowed the plaintiff's second cause of action, being of the opinion that the sale therein alleged to the French government was not procured by the plaintiff upon the terms of payment authorized by the defendants, and that they had not waived any departure from those terms; and to that part of his decision the plaintiff excepted and appealed.

Man & Parsons, attorneys, and *Jno. E. Parsons*, of counsel, for plaintiff.

Abbett & Fuller, attorneys, and *D. D. Lord*, of counsel, for defendants.

BY THE COURT.—FREEDMAN, J.—By letter, dated July 9, 1870, the defendants, constituting the firm of Schuyler, Hartley & Graham, of the city of New York, employed the plaintiff, a commission merchant, in Paris, France, to sell for them in France certain arms and military goods, and in consideration that he should do so, the defendants in said letter, as is claimed by plaintiff, agreed to pay him as compensation for his services in selling the same or any part thereof, the difference between certain prices therein stated for such arms and military goods, and the price which should be obtained upon the sale thereof, and they also offered to sell to the plaintiff at the same prices any of the said goods. All sales were to be paid for in the city of New York.

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On July 19, 1870, war was declared between France and Prussia, and on July 29, 1870, the firm of which plaintiff was a member, replied to defendants' letter of July 9, which had been written to plaintiff individually, to the effect that they could do nothing without samples, and that even with samples they hardly knew what could be done, as the war department had written that it was fully supplied.

On August 19, 1870, the defendants determined to send their confidential clerk, Mr. Reynolds, to France, with full power to act for them within certain instructions, which will presently be noticed, as their agent in the sale of goods, and on August 20, Reynolds sailed, taking with him some samples. Others were subsequently sent subject to his order. His instructions were to obtain prices, payable in New York, which were considerably higher than those which had been named to the plaintiff. In all other respects he seems to have been intrusted with full discretionary powers. He also bore a letter to plaintiff's firm in which the defendants introduced him as the representative of their firm, and in which they requested plaintiff's firm to co-operate with him.

Reynolds arrived in Paris on September 1, and on the following day he called on the plaintiff and handed him his letter of introduction. During the voyage of Reynolds some communications had passed between plaintiff and defendants, which, however, in the view hereinafter taken, are not of sufficient importance to be referred to with particularity.

On September 2, 1870, the day after the first interview with Reynolds, plaintiff wrote to the defendants that up to that time he had not accomplished any sales, that all was rocking in Paris, but that the financial bottom was all right, though the then government was about ended.

On September 4, there was a revolution in Paris,

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which resulted, among other things, in the establishment, on September 8 or 9, of a commission of armament with authority to deal with private parties for the purchase of arms.

On September 12, defendants' samples reached Paris, and on the following day May and Reynolds went together to the commission of armament to offer defendants' goods. On their way there May proposed some changes in the prices of some of the goods, and as these changes did not encroach upon the limits of Reynolds' instructions, the latter assented that they might be made.

In the course of the negotiation which then ensued, the commissioners of armament expressed their willingness to take a large portion of the goods offered, but declined to pay until arrival; and as Reynolds was not authorized to sell, except for cash on shipment, the negotiation was suspended.

On the same evening May ascertained that four-fifths of the price which the commissioners of armament were willing to pay, would cover defendants' interest in the sale, and thereupon he suggested to Reynolds, by way of getting over the difficulty, to propose to the commission that four-fifths be paid in New York on shipment, and the balance in France, on arrival of the goods. May also agreed that in such case he would take his compensation out of the payment to be made in France. Reynolds agreed to the suggestion. These terms were accordingly offered to, and finally accepted by the commission.

This transaction, together with further efforts made by May subsequently, during the siege of Paris, led to certain sales for which the defendants received the whole of the proceeds. For the sales stated in the first, third, and fourth causes of action set up in the complaint, the referee found that the plaintiff is entitled to compensation.

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Up to this point there is no conflict of evidence, and plaintiff's right to compensation is not seriously questioned. But as to the amount of compensation to which he is entitled upon the sales stated in the first and third cause of action, there is a decided conflict.

Reynolds testified that at his first interview with May he showed May the memorandum of prices below which he was not authorized to sell; that May compared these prices with those of the July letter, and found that they were higher, but that he made no objection to the increase, and no claim to the July prices, and that if he had, he (Reynolds) would not have employed him.

Reynolds further testified that on several other occasions, between the first interview with May and their joint visit to the commission of armament, he distinctly informed May that under all circumstances the goods would have to net in New York the increased prices contained on his (Reynolds') memorandum, and that May was satisfied with it.

And he also testified that, after a commission of five per cent. on his memorandum prices had been agreed upon, May, on the way to the commission of armament, proposed to ask in gold such of the memorandum prices as were in the currency of the United States, and that the difference should be allowed to him in addition to the five per cent., to which Reynolds assented.

May, on the other hand, says that at the first interview with Reynolds, as well as afterwards, he claimed the benefit of the July prices, and that he never agreed to take any different rate of compensation.

If the case rested here, and the proof showed that in the face of this claim made by May, Reynolds, without objection, accepted May's services, the assent of Reynolds to May's claim might be inferred, and if he had authority to bind defendants by such assent,

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and thereupon the case presented simply a conflict of testimony, the fact as found by the referee could not be disturbed.

But the case does not rest here ; nor does it present simply a conflict of testimony. The plaintiff, by his own testimony, showed that Reynolds never assented, but that, in reply to plaintiff's claim, he always said that the plaintiff had to fight this out with Schuyler, Hartley & Graham. On giving his version of the conversation had with Reynolds, immediately before their joint visit to the commission of armament, the plaintiff testified as follows :

Q. Did Mr. Reynolds then, or subsequently,—and if later state exactly at what stage of the proceedings—say anything to you, or did anything take place with reference to an effort on his part to increase the prices of the letter of July 9, 1870?

A. I have a list of prices in the handwriting of Mr. Reynolds, found among his papers, when I returned to Paris in the Spring of 1871, which, I think, he made that very day—the 13th of September.

Q. State what took place between Mr. Reynolds and yourself, with reference to those prices, and when it was, with reference to the commencement of your negotiations?

A. He said, “ We are going to show these samples now, and here are the prices, from which I will allow your concern a commission of five per cent., and all or any advance that you may obtain over those prices shall be for yourself.”

Q. Did he at that time show you a statement, or list of prices?

A. He did ; and I said that I should not accept anything of that kind, that I worked by the letter of July 9, and he made use of the expression, “ You will have to fight that letter with Messrs. Schuyler, Hartley & Graham ; these are the prices that I name.”

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Other similar admissions are in evidence.

Upon plaintiff's own showing, therefore, it is difficult to perceive how the report of the referee can be sustained as to the first and third causes of action alleged in the complaint.

Assuming plaintiff's construction of the letter of July 9 to be the correct one, the proposition therein contained and plaintiff's acceptance thereof, constituted a special contract, and unless plaintiff actually effected a sale or offered to buy according to the terms of it, he can maintain no action upon it against the defendants. And no time being specified therein, the defendants, it seems to me, were at liberty to vary their terms or to revoke and terminate the contract at any time before any such sale was actually effected or offer made. Whatever authority was conferred, was one not coupled with an interest in the goods themselves. It therefore remained revocable. The interest contemplated by the rule making an agency coupled with an interest irrevocable, must be one in the subject over which the power is to be exercised, and the power of revocation always includes the power to modify.

That Reynolds, even if he did not revoke, did essentially modify the contract originally entered into between the parties, at least so far as the same could be done against plaintiff's protest, and that for that purpose he possessed all the power and authority which the defendants themselves could have exercised if personally present, is not controverted, and there being no pretense on the part of the plaintiff that he subsequently came to an agreement with the defendants themselves concerning the point in dispute, it clearly appears from his own showing, that in point of fact there was a failure to agree upon a new rate of compensation. As to the extent of Reynolds' authority I will add, that in his brief the learned counsel

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for the plaintiff expressly concedes that there was no limitation of it in defendants' letter accrediting him to the plaintiff.

The real question involved in the present appeal, therefore, is, whether the defendants immediately preceding the joint visit of the plaintiff and Reynolds to the commission of armament, remained at liberty to take back their original proposition and to insist upon an increase of prices. If they had the legal right to make this change, the referee erred in giving to plaintiff the benefit of the July prices, though, as between the plaintiff and Reynolds, he may have been justified in disbelieving Reynolds. And whether they were free to do so, depends upon the further question whether up to that time plaintiff had effected a sale or offered to buy according to the terms of the letter of July 9.

It is quite clear that he had done neither.

Leaving out of view the change that occurred by revolution in the French government, as a fact rather weakening than strengthening plaintiff's case, the most that can be said of plaintiff's efforts up to the time now under consideration is, that by them he had put himself into communication with a party desirous of purchasing in a certain contingency. But that was not enough. That the French government might eventually desire to buy some of the goods, was a matter clearly contemplated by the defendants before they wrote the letter of July 9. The existence and address of this possible purchaser was matter equally well known to both parties. To earn the benefit of the special contract upon which plaintiff relies, it was incumbent upon him to complete a bargain according to the terms of it.

Thus, in *McGavock v. Woodlief* (20 *How. U. S.* 221), it was held: "As the terms of sale were explicit, the proposal to fulfill should have been equally so.

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Nothing should have been left to conjecture or speculation. There should have been as much certainty on one side of the contract as upon the other. Certainty in the offer to fulfill is as important to the vendor as certainty in the terms of the sale to the vendee, and equally necessary before the vendor can be put in fault.

“The broker must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commissions.

“Then he will be entitled to them, though the vendor refuse to go on and perfect the sale.”

In short, when the right to compensation depends upon a special contract, plaintiff must perform the undertaking assumed by him, and no matter what the terms and conditions may be, upon which the right to compensation depends, they must be performed as a condition precedent to a right of action for the recovery of the specific compensation (*Fraser v. Wyckoff*, 63 *N. Y.* 445; *Jacobs v. Kolff*, 2 *Hill*. 133; *Gregory v. Mack*, 3 *Hill*, 380).

It is only in cases where the broker is employed generally to find a purchaser, that it is sufficient to entitle him to compensation, that a sale is effected through his agency as its procuring cause. In such a case, his agency may consist, simply, in bringing the parties together, and leaving them to make their own bargain. Yet, if a sale actually results in consequence thereof, he is entitled to recover, and it then matters little whether the compensation for the service actually rendered has been fixed by agreement, or is left to depend upon a custom.

But the case at bar does not fall within that class of cases. It is a case of special contract which plaintiff had not performed, when defendants refused to be bound by it any longer. It was, therefore, competent

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for them to prescribe new conditions, upon which they would continue bound, and upon such new conditions being made known to plaintiff, he had his option to assent or to withdraw. Not having withdrawn, whatever services were subsequently rendered by him must be deemed to have been rendered as if no agreement for compensation, except such as the law implies, had been made. As the case stands, his protest is unavailing in the absence of proof that it was heeded by the defendants, and that it led to a new promise or agreement on their part, to pay the compensation originally named. It is not enough that he has rendered valuable services to the defendants. For these he may be entitled to a reasonable reward. But before he can recover the specific compensation sued for, it must appear, that before the change in the prices was communicated to him, he had done the very thing for which the reward that he demands was promised. True, strict performance could not be insisted upon, if it appeared that plaintiff, at the time in question, had substantially performed, and that the defendants had waived or prevented full performance. But the question of excuse for non-performance does not arise in this case.

The referee therefore erred in computing plaintiff's compensation claimed under the first and third causes of action alleged in the complaint upon the basis of defendants' proposition contained in the letter of July 9, and in adjusting the accounts between the parties upon such erroneous computation; and as such error necessitates a reversal of the whole judgment and the granting of a new trial, the point presented by plaintiffs' appeal in consequence of the refusal of the referee to allow anything on account of the second cause of action alleged in the complaint does not require further consideration at present. Plaintiff's claim in that respect will have to be examined again

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upon the new trial, upon the evidence which may then be produced, and determined according to the rules of law called for by the facts as they may then be made to appear.

In conclusion it may be well to say a few words yet concerning the settlement made between the defendants and the Remingtons. This, it is true, contained an admission by the defendants that the prices which they were entitled to receive, were only those contained in the letter of July 9. But such admission was not absolute proof of the fact, and the plaintiff himself has proved the contrary, as hereinbefore stated. On this state of facts the inference is that the Remingtons were wronged, and that they are entitled to recover the difference according to the proof in this case. But the plaintiff has no right to hold on to that difference.

The judgment should be reversed, the order of reference vacated, and a new trial ordered, with costs to defendants to abide the event.

SEDGWICK, J., concurred.

SPEIR, J. [Dissenting.]—On July 9, 1870, the defendants wrote a letter to the plaintiff in Paris whereby they employed the plaintiff to sell for them in France certain arms and military goods, and agreed to pay to him as compensation for his services in selling the same, or any part thereof, the difference between certain prices therein stated and the price which should be obtained on the sale thereof. They also offered to sell to the plaintiff at the same price any of the said goods.

An important feature in the answer, directly bearing upon the main question in issue between the parties, is the allegation relied upon by the defendants, as a defense to the plaintiff's claim, that the firm of E.

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Remington & Sons were interested with them in certain of the arms, and that, in reliance upon an alleged agreement made by their agent Reynolds with the plaintiff, in changing prices, which it was asserted was made by the letters of September 27, 1870, they had settled with E. Remington & Sons, paying them over \$20,000 more than if they had settled by the prices of July 9, 1870; that they would not have paid said sum to the Remingtons if they had believed that the plaintiff had any just claim against them other than as stated in the letters of September 27, 1870; and they therefore insisted upon the \$20,000 by way of counter-claim. This issue in the pleadings, and the abandonment of this counter-claim, will be referred to presently.

The letter of July 9, 1870, was written in anticipation of war between France and Prussia. On July 4, 1870, the proceedings in the corps legislatif everywhere produced the belief that war was inevitable. The French legislature declared war on the 15th, and on the following 19th of July, the French Minister left Berlin. The defendants, between July 15 and 19, began to write letters to different people in Europe on the subject of selling arms, and among others wrote the letter in question. It is apparent from the whole record that the future negotiations were subsequent to the declaration of war, and there is no intimation that the business arrangement between the parties had become invalid by the fact of war. If the letter, therefore, was accepted and acted upon, the question of war has nothing to do with the validity of the contract between the parties, provided its performance was not rendered impossible by any act of law. This is not claimed.

On the said July 29, the plaintiff's firm replied to the letter of July 9, to the effect that he could do nothing without samples, and even with samples he hardly

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knew what could be done, as the war department had written that it was fully supplied. As the defendants had written in the proposal of July 9, "You can telegraph us if you think necessary," the plaintiff on August 23, then next, telegraphed to the defendants inquiring "How many arms they could ship with 400 cartridges each," and that he, the plaintiff, could probably contract all having that number." This message refers in terms to the letter of "July 9," as plaintiff's ground of action. On the following day the defendants' answer by telegraph, "Can furnish about all the arms per our letter of July 9," and it informs the plaintiff, "Our Mr. Reynolds left with full set of samples by steamer Brest last Sunday—meet him." The plaintiff wrote on August 26 to the defendants, repeating his telegram of the 23rd, and the defendants, on the following September 7, acknowledged the receipt of plaintiff's letter of August 26, and in it confirms in detail the prices contained in the first letter of July 9, 1870. They write, "We still can furnish 1500 Remington rim fire carbines, cal. 52, \$15.50, metallic cartridges for ditto \$21.50," etc., etc. This letter of September 7, 1870, was written only seven days before the sale was made; and the sale was made before the letter could reach Paris.

From the above correspondence it is plain that the defendants' offer in their letter of July 9 was accepted by the plaintiff, and upon the terms proposed. Up to this point the negotiation was conducted solely between the plaintiff and the defendants, and there is no conflict of evidence. The terms proposed were not only accepted by the plaintiff, but clearly ratified by the defendants' acceding to his requests in forwarding samples, without which sales could not be made, and without change in the prices for the goods to be sold.

A contract then existed between the parties by which the defendants became bound in law to pay to

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the plaintiff for all such goods named in their offer of July 9, 1870, as he should sell to the French government or any one else, for his services on such sale the difference between the prices in such offer stated for the goods and those which he should obtain upon their sale.

Were any material changes made in the terms of this contract by the plaintiff, either with the defendants or their agent, Reynolds?

It is claimed that when Reynolds went to Paris he had certain instructions as the defendants' agent in the sale of the goods, and that, prior to September 15, 1870, the date of the French sale, he and the plaintiff had agreed upon an advance in the prices contained in the letter of July 9, correspondingly reducing the plaintiff's compensation. On the part of the plaintiff it is claimed that the agent had no authority from his principals to change the prices, that the defendants had not given such instructions to their agent, or claimed to have made any change, until after the sale had been completed.

Mr. Reynolds left New York for Paris August 20, 1870, and the first interview with the plaintiff was had September 2 following. Reynolds took with him samples of goods from the defendants which the plaintiff had called for. These samples were marked for the plaintiff, and the bills of lading stated the goods to be for him. The defendants' letter, introducing him to the plaintiff, August 19, 1870, makes no mention of prices. "It trusts that the plaintiff will give him his hearty co-operation, that the plaintiff would find him well posted as to the quantity and quality of arms, and he would represent the firm in obtaining arms and cartridges." These arms and cartridges were to be obtained from the defendants in New York, the quantity and quality of which was known to Reynolds.

I am unable to find from the correspondence any

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evidence that the defendants at any time before the sale communicated to the plaintiff or the agent, Reynolds, that they had changed the prices of the goods. The sale was made on September 14, 1870, and communicated to the defendants by a telegraphic dispatch the same day, in cipher, devised by the plaintiff, and agreed upon between the parties beforehand; and the prices named therein are the prices of the letter of July 9, 1870. On September 7, the defendants wrote, "Before this reaches you Mr. Reynolds will inform you what we can furnish," and in this letter the prices named for the goods are the prices contained in the letter of July 9.

As the case stands it does not rest upon the conflicting testimony of Reynolds and the plaintiff relating to the conversation between them about the change of prices. There seems to be on that point a positive contradiction as to what was said. The referee having the parties before him in the light of the correspondence in the case gave unqualified credit to the plaintiff, and I am of the opinion the evidence fully justifies his judgment. Nor can I see the significance claimed by the defendants' counsel to the one point on which Reynolds and the plaintiff appear to have agreed. The statement by both is in substance that at the time they were to show the samples to the commission of armament Mr. Reynolds exhibited to the plaintiff a statement of prices, and the latter said, "he should not accept anything of the kind, that he worked by the prices of July 9, and Mr. Reynolds said, you will have to fight that letter with Messrs. Schuyler, Hartley & Graham." This is in accord with the plaintiff's case. The point is that the defendants did not change the terms of the contract until after it was executed, when they had not the right to do so. Reynolds, as agent merely, could neither by any act of his own, or by any declaration he might make, prove either his agency of

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the defendants or the extent of his powers. The declarations or representations of Reynolds as agent, not expressly authorized by his principals, could not bind the plaintiff unless within the scope of his agency (*N. Y. Life Ins. & Trust Co. v. Bede*, 3 *Seld.* 364).

But this is not the whole case. The defendants have furnished affirmative testimony showing, I think, conclusively that they acted upon the terms of the July letter, and did not authorize their agent, Mr. Reynolds, to raise their prices until after the sale was effected. The record shows that the defendant Schuyler was examined before the trial upon the allegation in the answer relating to the defendants' counter-claim of \$20,000, which it alleged had been paid to the Remingtons on a settlement of their respective interests in the goods. It appears from Mr. Schuyler's testimony that the settlement was based upon the prices of the letter of July 9, 1870, and not on the prices of the letters of September 27, 1870. On the examination the books were not produced, but on the trial they were produced, and from them it appears that the plaintiff is stated to have been the purchaser of the goods, and on the bill entered in the book the letter of July 9 is referred to as containing the prices at which they were sold. This evidence is confirmed by the testimony of both the agent, Reynolds, and the defendant, Hartley. It is but fair to say that they both claim that the settlement with the Remingtons was a forced settlement, and in some way should not be deemed as binding.

But the copy of the book produced on the examination of Mr. Schuyler before the trial, did not contain the name of "May, July 9, 1870," over the bill as settled by the defendants with the Remingtons, which appeared on the bill produced on the trial. The defendants must be concluded by their books containing the sales made by the plaintiff, at the time and the

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prices therein named. This counter-claim set up in the answer was abandoned on the appeal by the defendants' counsel.

On December 12, 1870, the samples which the plaintiff had written for, reached Paris, and on the following day he, co-operating with Reynolds, as requested by the defendants, offered the goods by sample to the commission of armament, and in the course of the negotiation, it was agreed that four-fifths of the price which was to be paid should be paid in New York on shipment, and one-fifth thereof should be paid in France, on arrival of the goods, and that the plaintiff should take his compensation out of the payment made in France. If this be deemed to be a variance of the contract, the answer is that the terms were assented to by the defendants. The plaintiff's telegram of August 23, 1870, informed the defendants that French sales would be made in Paris, and the telegram informed the defendants when the sale was made *how* the payments were to be made. Plainly the defendants were called upon either to decline such a change or to say to the plaintiff that they would not accept it as performance of the contract. They did neither, but received the four-fifths of the proceeds in New York, and afterwards received one-fifth, which belonged to the plaintiff. This was a ratification. The subsequent adoption was equivalent to a prior authority.

The plaintiff must be presumed to have been selected by the defendants as their agent for his skill, discretion, and the confidence consequently reposed in him by his principals. He had been their clerk and partner in New York, and their correspondent in Paris, where he resided. He was familiar with the French language, and had access and intercourse with prominent public and military men in France. Mr. Reynolds was not versed in the French language, and

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could not speak it, but was familiar with the quality and quantity of goods which the defendants had, or could procure in New York, for sale.

The plaintiff was not in a position to delegate his authority to Reynolds, or anybody else, without express power conferred by his principals. His relation to them involved personal trust and confidence, and largely called for discretion and judgment.

It is not claimed that the goods sold, as stated in the fourth cause of action, are mentioned in the letter of July 9, 1870. The claim is for a commission of five per cent. on the sale of the goods. The defense here is that the sale of these arms was not the result of any act of the plaintiff, but that they were sold by the defendants to the French consul in New York. The referee has found for the plaintiff upon the ground that he, as broker, was authorized to sell the goods to the French government; that he had made such offer and it was distinctly communicated to the defendants, and that they adopted the offer to sell. It is true he did not himself procure any agreement to be made. He had procured and exhibited the samples, without which the French commission of armament would not have known anything of the arms. He brought the buyer and the seller together, gave notice of the price, and put the government in the way of treating with the defendants. I think the case is brought within the rule well settled, and the finding of the learned referee should be sustained.

The second cause of action was found for the defendants. The referee was of the opinion that the defendants had authorized the plaintiff to sell only for cash in New York, and that the plaintiff contracted to sell these goods, the whole amount to be paid in France. He came to the conclusion that the defendants did not ratify in this case what he found to be a departure from their instructions. Besides, from an examination

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of all the testimony, I am of the opinion that there is a conflict whether the plaintiff or the defendants themselves effected the sale, and the decision of the referee on this branch of the case should stand.

The case is unusually voluminous, and a great many exceptions were taken during the progress of the trial, to the referee's rulings in receiving and rejecting testimony. It is not necessary to examine the evidence and exceptions in detail. Much of the evidence was irrelevant, and I have been unable to discover any valid exception. Nearly one hundred propositions of fact, and about one quarter of the number in law, were submitted for settlement. These chiefly consisted of requests to find evidence and not facts, and the referee had mostly decided by his report, those which the party had the right to require him to pass upon. I am of the opinion that there is ample evidence in the case, independent of the objections and exceptions taken, to support the judgment, and the findings and conclusions upon which it rests.

The judgment entered on the report of the referee must be affirmed.

**THE GERMANIA BANK OF THE CITY OF NEW
YORK, PLAINTIFF, v. HESTER FROST, DEFEN-
DANT.**

INDORSER OF PROMISSORY NOTE, LIABILITY OF.

A holder of a note cannot, by any agreement with the maker, without the consent of the indorser, change the original contract, or affect the remedies of the indorser against the maker, without discharging the indorser.

When judgment has been confessed upon a promissory note, exe-

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cution issued, and levy made upon property of the maker as security, the payee discharges the indorser by satisfying such judgment without the indorser's knowledge or assent.

An indorser of certain promissory notes, having consented that the holder might compromise with maker, and agreed to still remain liable as indorser for full value of notes, and said holder, with other creditors, having signed a composition deed agreeing to take fifty per cent. of their claims, which was the compromise to which the indorser consented, and said holder afterwards, in violation of said agreement, having demanded and received, in lieu of the original notes, without the indorser's knowledge or assent, notes for one hundred per cent. of his said claim, such notes are void as being in fraud of creditors, and the indorser is released from his agreement.

Before CURTIS, Ch. J., and SANFORD, J.

Decided January 7, 1878.

At the trial of this action, after the testimony was taken, the court directed a verdict for the defendant, and ordered the exceptions to be heard in the first instance at the general term.

The complaint was upon two promissory notes, charging the defendant as indorser. There was evidence that Richard W. Frost, defendant's son, confessed judgment on the notes in question, May 26, 1874, that an execution issued, under which a levy was made on defendant's property, and that the plaintiff satisfied the judgment August 7, 1874. There was also placed in evidence a composition agreement of Richard W. Frost with his creditors, signed, among others, by the plaintiff. The plaintiff, after signing the composition agreement, refused to accept fifty per cent. in the notes of R. W. Frost, according to the agreement, but insisted upon and received from Frost his notes for the full amount. The defendant put in evidence the following, signed by the defendant :

Statement of the Case.

“JUNE 22, 1874.

“GERMANIA BANK:

“I being aware of the agreement entered into between Richard W. Frost and the Germania Bank, with reference to two notes amounting to \$1,250 made by Richard W. Frost, and indorsed by me, I consent that the Germania Bank may compromise with Mr. Frost, and that I am to remain liable as indorser on said notes to the full amount thereof, until they are paid.

“Yours, &c.,

“HESTER FROST.”

Subsequently the plaintiff executed and delivered to Richard W. Frost the following receipt and release:

“Received from Richard W. Frost, of the city of New York, his three promissory notes, as follows: one dated July 1, 1874, payable four months after date, for \$416.66-100; one dated same day at five months for \$416.68-100, and one dated same day for \$416.66-100, payable six months after date, reserving, however, our rights against the indorser on the original notes, and we do hereby release and discharge the said Richard W. Frost from all claims and demands of every nature or kind we have or had against him, excepting the promissory notes above mentioned.

[L.S.] “Witness our hand and seal at the City
 of New York, this 14th day of July,
 1874.

“Germania Bank,

“C. SCHWARZWAELDER,
“President.”

At the trial, after the closing of the testimony, the defendant moved to dismiss the complaint on these grounds: 1st. The defendant being indorser on the two notes in suit, and Richard W. Frost, the maker, having confessed judgment to the plaintiff to secure the same, on which execution was issued, and a levy made on the property of Richard W. Frost, and the

Plaintiffs' points.

plaintiff having, without the consent of the defendant in this action, satisfied the judgment, she is discharged from liability as indorser on said notes.

2nd. The plaintiff having executed Richard W. Frost's composition deed, to accept 50 centum of its debt against him, without reserving its rights in the deed against the surety, discharged the defendant as such surety.

3rd. The plaintiff having executed the composition deed, in and by which it agreed to accept 50 per centum of its indebtedness against Richard W. Frost, in his notes in full payment and discharge of such indebtedness, and having refused to accept the same, unless 100 per centum in his notes were given, which the plaintiff accepted; such acceptance was a fraud upon the creditors and discharged the defendant as surety.

4th. The defendant's consent that the plaintiff might compromise with Richard W. Frost, was a consent to compromise, in accordance with the terms of the composition deed, and the plaintiff having failed to compromise in accordance therewith, the consent thereupon became void.

5th. The case arising in questions of this character, was not whether the act of the plaintiff was an injury to the surety, but whether it might have been injurious.

The court directed a verdict for the defendant, exceptions to be heard in the first instance at the general term, and the plaintiff's counsel excepted.

William A. Coursen, of counsel, for plaintiff, among other things, urged:—I. The confession of judgment did not, in any wise, invalidate the claim of the plaintiff against the defendant (the indorser of the notes in controversy) (*Mohawk Bank v. Van Horn*, 7 *Wend.* 117; *Sizer v. Heacock*, 23 *Id.* 81).

Defendant's points.

II. If there were any reason why the bank should be restrained in any way in compromising with the maker, it can hardly be contended that a change in terms in favor of the holder of the note, as against the maker, can injuriously affect the indorser. Thus, if the original composition paper would secure from the maker a certain percentage on the whole amount, and thus save the indorser an ascertained portion of liability, very surely, if by any composition, the bank (or holder of the notes thus indorsed) can secure a greater percentage from the maker of the note—so far will the indorser be benefited (See *Lynch v. Reynolds*, 16 *Johns.* 41, 42; *Bruen v. Marquand*, 17 *Id.* 61; *Edwards on Bills*, 571, and cases there cited).

III. We may here advert to the well-known law that the note of a debtor does not operate as payment of a debt, unless the note is actually paid (See *Coles v. Sackett*, 1 *Hill*, 516; *Hill v. Beebe*, 13 *N. Y.* 556; *Bradford v. Fox*, 38 *Id.* 289; *Winsted Bank v. Webb*, 39 *Id.* 325).

C. Bainbridge Smith, of counsel, for defendant, among other things, urged:—I. The defendant being the indorser on the two notes in suit, and the plaintiff having procured the maker, Richard W. Frost, to confess judgment, to secure the same, and having issued execution on the judgment, and caused a levy to be made on the property of Frost, a satisfaction of this judgment without the assent of the defendant discharged her as such indorser (*Vose v. Florida R. Co.*, 50 *N. Y.* 369, 374; *Ducker v. Rapp*, *Id.*; *S. C.*, 4 *N. Y. Weekly Dig.* 174; *Bangs v. Strong*, 10 *Paige*, 11, 16; *Boyd v. McDonough*, 39 *How. Pr.* 389; *English v. Darley*, 2 *Bos. & Pul.* 62; *Mayhen v. Crockett*, 2 *Swanst.* 191; *Reese v. Barrington*, 2 *Ves. Jr.* 542; *Eyre v. Bartop*, 3 *Mad.* 225; *Bank of Steubenville v. Leavitt*, 5 *Ham.* 207). 1. The defendant as surety was en-

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titled to be subrogated to all the rights of the plaintiff, and had a right to claim the judgment recovered by the plaintiff against the principal debtor: the satisfaction of the judgment operated to discharge the surety. (*Boyd v. McDonough*, 39 *How. Pr.* 389; *Vose v. The Florida R. Co.*, 50 *N. Y.* 369, 378). 2. The defendant as indorser and surety was discharged from liability upon the notes by reason of the time given to the drawer of them without her assent (*Ducker v. Rapp*, 4 *N. Y. Weekly Dig.* 174; *Reese v. Barrington*, 2 *Ves. Jr.* 540; Summer's Ed. note A). 3. The question is not whether the arrangement did prove injurious, but whether it might have been injurious to the surety (*Ib.*).

II. The plaintiff executed Richard W. Frost's composition deed agreeing to accept fifty per cent. on the dollar against him without reserving its rights in the deed against the surety. The deed in such cases operates as a discharge to the surety. (See composition deed, p. 11, 12; *Exp. Glendenning Bucks*, *B. C.* 517; *Cullingworth v. Lloyd*, 2 *Beav.* 385; *Lewis v. Jones*, 4 *B. & Cress.* 506; *S. C.*, 10 *E. C. L. R.* 393; *Wilson v. Lloyd*, 16 *Eq.* 60.)

III. The plaintiff having executed the composition deed, in which it agreed to accept in Richard W. Frost's notes fifty per cent. of its indebtedness against him in full payment and discharge of such indebtedness, and having refused to accept the compromise notes or discharge Frost unless his notes were given for the full amount which the plaintiff accepted; such acceptance was a fraud upon the creditors and discharged the defendant as surety (*Breck v. Cole*, 4 *Sandf.* 79; *Pineo v. Higgins*, 12 *Abb.* 334; 1 *Story's Eq. Jur.* §§ 378, 379; *Lawrence v. Clark*, 36 *N. Y.* 128).

BY THE COURT.—CURTIS, Ch. J.—The defendant

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having consented to the making of the compromise between the plaintiff and Richard W. Frost, with reference to the two notes, amounting to \$1,250, made by him and indorsed by her, and agreeing to remain liable as indorser on the same, to the full amount, or until paid, is not in a position to dispute her liability as indorser, unless she is discharged by some act on the part of the maker, or the plaintiff, having in law the effect of releasing her from this agreement.

It is contended by the plaintiff, that this consent of the defendant was in general terms, and does not, and was not intended to limit the parties to any particular terms or manner of compromise as a condition of the indorser remaining liable. The evidence in the case tends to show the contrary. The consent of the defendant was made on June 22, 1874, and upon its face refers to some existing agreement of compromise between the plaintiff and the maker of the notes, of which the defendant is aware, and apparently in consequence of which the defendant signs the consent. The composition agreement between the maker of the notes and his creditors, including the plaintiff, to accept fifty cents on the dollar in his notes for their respective claims, appears to have been made some time prior to July 1, 1874, and seems to be the agreement referred to in her consent, and not the one entered into on July 14, 1874, by which the plaintiff releases the maker from all claims against him in consideration of one hundred cents on the dollar in his notes. As this latter transaction was a departure from the terms of the composition agreement, and occurred over three weeks after the defendant signed the consent, it must, in the absence of proof to the contrary, be assumed that it was entered into without the knowledge or concurrence of the defendant, and that her agreement to remain liable was based upon the existence and fulfillment of

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the composition agreement referred to in the instrument executed by her.

If the plaintiff elected to make a new compromise, and take new notes from the maker, and to release him the original notes, the indorser is released, notwithstanding any reservation as to her liability as indorser which the plaintiff and the maker may agree upon without her assent. If the plaintiff wished to hold the defendant as indorser, the composition in reference to the making of which she consented to remain liable as such should not have been abandoned. Her consent extended to no other compromise than that referred to in her consent, and the substitution of a different one was a breach of the condition on which she consented to remain liable, irrespective of the question whether she would be benefited or not by the substitution.

It is also evident that the plaintiff by entering into this second composition agreement with the maker of the notes, and discharging him from all liability thereon, placed itself in the position where it was obliged to satisfy the judgment it held against the maker as collateral security for the original notes, after having issued execution and having caused a levy to be made on the property of the maker, thus depriving the defendant of the benefit of this collateral security, and destroying its value, without the assent or knowledge of the defendant. It is well settled that a creditor cannot, without the assent of the indorser, by any agreement with the maker of the note, change, as in this case, the original contract, or affect the remedies of the indorser against the maker, without discharging the indorser; nor has the creditor the right to release and discharge the collateral securities, and collect from the indorser what should have been paid out of the property of the maker who is primarily liable (*Vose v. Florida R. R. Co.*, 50 *N. Y.* 374; *Bangs v. Strong*, 10 *Paige*, 16).

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It is apparent that the plaintiff, having signed the composition deed, is debarred from profiting by any private agreement that secures to it any advantages that are not shared in by the other creditors. The act of the plaintiff in taking additional security is in violation of that good faith, that all were to share alike, which naturally induced the other creditors to sign, and the realization of its additional security to that extent diminishes the ability of the debtor to comply with his agreement with the other creditors. Such an agreement for additional security is a fraud upon the other creditors, and consequently all the notes that were given as the fulfillment of such an agreement are illegal and void (*Breck v. Cole*, 4 *Sandf.* 79).

The plaintiff having taken, in lieu of the original notes, these notes that were fraudulent and void, has destroyed the value of what the defendant would be entitled to be subrogated to, and by its own acts has prevented the defendant from ever being in a position to enforce them against the maker. To hold the surety liable after such acts on the the part of the creditor, would be inconsistent with the requirements of good faith, and conflict with established legal principles.

The remaining exception presented by the appellant, was to the admission of a question addressed to a witness at the trial; but as no ground was then stated for objecting, there is no occasion for considering it.

The plaintiff's exceptions are overruled, and the defendant is entitled to judgment upon the verdict, with costs.

SANFORD, J., concurred in the result.

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ABRAHAM B. CLARK, PLAINTIFF, v. ABRAHAM
BININGER, DEFENDANT.

RECEIVERS, SUBJECT TO ORDERS OF COURT.

Neglect or refusal to comply with such orders subjects him to punishment by fine and imprisonment, for contempt.

The summary jurisdiction of the courts, under the common law, to punish a delinquent officer for disobedience to its lawful order, has not been restricted by statute.

It is sufficient if the party charged with contempt had reasonable notice of the application to punish him, and was served with copies of the affidavits upon which it was based. The law does not contemplate an idle ceremony in serving papers that have already been served, and which are in the possession of the party accused, and are referred to in the order to show cause, served on him (*Albany City Bank v. Schermerhorn*, 9 *Paige*, 375).

Before CURTIS, Ch. J., and VAN VORST and FREEDMAN, JJ.

Decided January 7, 1878.

Appeal of Thomas J. Barr, receiver, from an order of the special term, adjudging him guilty of contempt, and imposing a fine.

James Henderson and Henry C. Denison, for Thos. J. Barr, receiver, appellant.

George N. Titus, in propria persona, respondent.

BY THE COURT.—CURTIS, Ch. J.—Thomas J. Barr, the receiver in this action, appeals from an order adjudging him in contempt, for refusing to obey an order of the court, requiring him to pay out of the property, or its proceeds, that he holds as receiver, a sum suffi-

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cient to discharge the lien of the respondent, George N. Titus, thereon, and imposing a fine upon him to indemnify the respondent.

The appellant claims that the court had no power to impose a fine for his disobedience to the order requiring him, as receiver, to pay out of the property, estate and effects, by him so held, or the proceeds thereof, the amount for which it was adjudged the respondent had a lien thereon. It is urged that the court, by sections 4 and 5, 2 *R. S.* 534, concerning contempts, is restricted, in a case of this nature, to issuing a precept to commit the person thus disobeying, as for a refusal to pay costs, or any other sum of money, so that when committed he may avail himself of the liberties of the jail, and of the statutes respecting assignments by imprisoned debtors.

It may be doubted if the legislature intended to limit the jurisdiction of the courts, when seeking to compel a delinquent officer to deliver over or account for property, or the proceeds of property, coming into his custody temporarily and solely in his official capacity, to confinement within the liberties of the jail, until he should make an assignment for the benefit of his creditors. I can see no reason for holding that the ancient and summary jurisdiction of the courts, in such contingencies, has been restricted to such a feeble and ineffectual remedy. The eighth subdivision of the first section (2 *R. S.* 533), of the statute declaring the power of the court in certain cases to punish for contempt, extends this power to all other cases where attachments and proceedings, as for contempts, have been usually adopted and practised, in courts of record, to enforce the civil remedies of any party to a suit in such court, or to protect the rights of any such party. In the learned opinion of the court, COWEN, J., in *The People v. Nevins* (1 *Hill*, 169), a proceeding to compel an attorney to pay over moneys, it is stated that this

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statute nowhere forbids the court to proceed in the former common law mode ; but merely provides *that it may* commit in a particular form short of that.

But the order itself is simply one requiring the appellant, as receiver, to perform an act in respect to the property, or the proceeds of it, that he holds as receiver, and for the discharge of a certain lien thereon, and his disobedience of such order is not one of the class of contempts for the non-payment of costs, or any other sum of money, contemplated by section four of the statute above cited. The proceeding under the twentieth and twenty-first of the succeeding sections, by which the appellant was convicted of a contempt, and fined for refusing to perform the acts required of him as a receiver, was within the power and jurisdiction of the court.

The appellant alleges that there was no proof before the court, that a certified copy of the order, requiring the payment of the money in question, was ever served upon him, or that it ever came to his knowledge, and that a copy of the demand made upon him was not served upon him, and that consequently there was an omission to serve him with a copy of all the papers upon which the motion to punish him was made.

The affidavits of the service of a certified copy of this order on him, April 19, 1877, personally, and also of a copy on his attorney, April 16, 1877, and the affidavit of the making and service of the demand on him, are clear and specific. The affidavit of the respondent is equivocating, and as far as intelligible, shows that this demand and certified order were not served upon him on May 28, 1877, nor upon him or his attorney since. His attorney makes no affidavit about it.

It was sufficient, if the appellant had reasonable notice of the application to punish him, and copies of the affidavits and papers upon which it was based.

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The proceeding is not invalidated because some of the papers or affidavits were served previously to others. The papers were served in compliance with the order to show cause. The law does not contemplate an idle ceremony in again serving papers that have been already duly served, and which are in the possession of the accused, and are referred to in the order to show cause served on him (*Albany City Bank v. Schermerhorn*, 9 *Paige*, 375).

The affidavit of the appellants fails to establish that he was incapacitated from complying with the terms of the order, by reason of the failure of the Bowling Green Savings Bank, where he alleges he kept his funds. He states that at the time of the failure of the savings bank, there was to his credit, as receiver, the sum of \$9,302.68; but he omits stating that the whole or any part thereof was lost by such failure, or was not repaid to him by the bank. Even if it was claimed that he had lost anything by the failure of that bank, there is nothing to show that it was a proper or designated depository for trust funds, or that it was even reputed to be a proper or safe one for such a deposit, or in fair credit or respectable standing. The affidavit of the appellant, as to the disposition he made of the property that passed into his custody as receiver, is too vague and unsatisfactory to sustain his appeal, on the ground of incapacity to comply with the order (*O'Mahoney v. Belmont*, 62 *N. Y.* 150).

The failure of the appellant to satisfy the lien of the respondent produced a loss or injury to the amount of that lien, and the same was clearly shown before the judge, who imposed the fine to indemnify the respondent for such loss, in accordance with section 21 of the statute above referred to.

If the order, which the appellant elected to disobey, was erroneous, he could have appealed from it. He chose not to pursue that course, and now urges that

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its merits are properly inquirable into on the appeal from the order adjudging him in contempt, citing *Brinkley v. Brinkley* (47 *N. Y.* 50).

The court, in originally transferring the possession of the property in the custody of the receiver to the assignee in bankruptcy, had and exercised its equitable jurisdiction in protecting a pre-existing lien upon it, the justice and legality of which is shown, and should not be questioned by the appellant, who is adjudged in contempt for disobeying a subsequent proper and collateral order, made in carrying out and giving effect the original order.

His duty as receiver was to comply with the orders of the court, and it is no part of his duty, so far as they determine the liens and rights of other parties, to contest them and make such contests a pretext for not accounting for and not delivering over as directed, the property, or its proceeds, that came into his custody as receiver.

The proofs submitted do not establish the claim of the appellant, that the order requires the payment of \$100 more than is due. The adjudication is, in effect, that the lien of the respondent, after deducting \$100 from the aggregate of the several amounts reported in his favor is \$5,237.80, not \$5,137.80, as claimed by the appellant:

The order appealed from should be affirmed.

VAN VORST and FREEDMAN, JJ., concurred.

Statement of the Case.

LEWIS SIMMONS, ET AL., PLAINTIFFS AND RESPONDENTS, v. JULIUS KAYSER, DEFENDANT AND APPELLANT.

PLEADING.—LANDLORD AND TENANT.

In an action brought by the lessors against the lessee of certain premises for one quarter's rent, the lessee, defendant, alleged in his answer that the plaintiffs, with the intent of inducing defendant to accept the lease, declared, or falsely represented to the defendant, that the plaintiffs' lease of the premises expired May 1, 1876, whereas they well knew their lease expired February 1, 1876; that defendant accepted the lease *relying upon these representations*, which were made by plaintiff with intent to defraud defendant into accepting this lease; that defendant went to great expense, etc., and was obliged to move out of the premises February 1, 1876, and rent a new store at an advanced rent, at great expense and loss of custom, to his damage, &c. *Held*, that this defense was insufficient as a bar to the plaintiffs' claim; that the question of fraud was not raised, as there was no allegation that defendants *were deceived* by the alleged fraudulent representations; that such allegation cannot be supplied by inference or presumption (*Lefler v. Field*, 51 N. Y. 621); that the defense is also insufficient in not alleging that defendant was obliged to move, &c., *on account of the alleged fraudulent representations*, and in omitting to allege any damage therefrom.

The above allegations were designated in defendant's answer "a first defense." *Held*, that the defendant could not afterwards be allowed to insist that they constituted a counter-claim, and thus mislead his opponent, there being an omission in the answer to intimate in any way that the defendant intended so to do (*Bates v. Rosecrans*, 37 N. Y. 412).

CURTIS, Ch. J., and SANFORD, J.

Decided January 7, 1878.

Appeal from an order sustaining a demurrer to the first defense stated in the defendant's answer. The facts are sufficiently stated in the opinion of the court.

Appellant's points.

Lewis Sanders, of counsel, for appellant, among other things, urged :—I. It may be conceded for the purposes of this case, that the answer does not set up a *defense* in bar of plaintiffs' claim. It is a counter-claim. The learned judge below sustained the demurrer because the answer was called a defense, and not a counter-claim. It has been expressly decided that such misnomer—if such it be—is not an objection of any validity (*Springer v. Dwyer*, 50 *N. Y.* 22).

II. It only remains to be seen whether the facts alleged constitute a counter-claim (*Isham v. Davidson*, 50 *N. Y.* 22). An examination of the authorities will show that the case at bar comes within the rule laid down. In *Taylor v. Guest* (58 *N. Y.*, at foot of p. 266), the court say :—“There is an absence in this case of any finding that the plaintiff relied upon the false representations.” The answer here alleges a reliance. In *Lefler v. Field* (52 *N. Y.* 622), the court says there was no allegation of an “*intent to deceive*,” or that the agent was deceived—that is, relied upon the false representations. The answer here alleges, a *false representation*, with the intent to induce the making of the contract, and with the *intent to defraud* defendant, and, an *acceptance by defendant in reliance upon said representations*. The case of *Meyer v. Amidon* (45 *N. Y.* 170), and *Oberlander v. Spiess* (45 *N. Y.* 177), demonstrate that all the elements of fraud are alleged in the answer necessary to constitute a cause of action. *Moore v. Rand* (60 *N. Y.* 211), is a direct authority both in support of the counter-claim and the right to hold plaintiff for *damages for fraud* without rescinding the contract.

III. Eviction not necessary to be shown ; may aver a paramount title in existence at time of lease (*Grannis v. Clark*, 8 *Cow.* 42). The answer and reply show actual eviction and paramount title.

IV. Rescission on ground of fraud not necessary to

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enable party to recover for damages caused by fraud (Van Epps v. Harrison, 5 *Hill*, 63).

V. Subsequent dealings under the contract after knowledge will bar rescission of the contract. But in the answer no dealings subsequent to the discovery of the fraud are alleged.

VI. To enable a party to claim a rescission, he must restore, or offer to restore, all he has received under the contract. But the defendant has received nothing but the premises, which were taken away by paramount title. There is nothing to restore.

R. W. Huntington, of counsel, for respondent, among other things, urged :—I. This court has held that whatever is necessary to constitute a defense, whether partial or total, must be averred as well as proved, and that averment is necessary, even where the existence of the fact in question may be presumed from the existence of other facts (Van De Sande v. Hall, 13 *How. Pr.* 460).

II. An antecedent fraud, by which one is induced to enter into a contract to his damage, is, when properly pleaded, good as a counter-claim, and nothing else. This kind of grievance is simply ground for an action of deceit, and is properly a counter-claim in an action upon the contract (More v. Rand, 60 *N. Y.* 212). Apart from the insufficiency of this new matter as a defense or counter-claim, it is a fatal objection to it, as a counter-claim, that it “does not purport to be a counter-claim. It designates itself as a ‘further defense’ simply, and there rests. No particular form of words is necessary to make a pleading a counter-claim. The ordinary and most satisfactory form of giving that information is by a statement that the pleading is a counter-claim, or by a prayer for relief. The present pleading, however, contains no words that would have justified the plaintiff in supposing that any

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personal judgment was sought against him, and in preparing for that emergency" (Bates v. Rosekrans, 37 N. Y. 412).

III. The only allegation savoring of an eviction is in these words: "that on February 1, 1876, the defendant was obliged to move out of said premises." The declaration may be true without showing a cause of action. The defendant may have been obliged to move out of the premises for a variety of causes, of which no court can take judicial notice (Grannis v. Clark, 8 Cowen, 136). The court will not aid a pleader who omits a material allegation, the presumption being he could not make it (Hofheimer v. Campbell, 59 N. Y. 269).

IV. The only allegation in the defense as to the defendant having been influenced by the alleged representation, is "that defendant accepted said lease, *relying* upon said representations." This is not enough (Taylor v. Guest, 58 N. Y. 262). If the defense had alleged that the plaintiffs, "by falsely and fraudulently representing that their lease expired on May 1, 1876, induced the plaintiff to accept the lease in the complaint mentioned," the precedents would have been complied with (§ 2, *Chitty's Pleading*, *680, *688). The defense does not raise an issue of fraud, because it fails to allege that the defendant was in fact deceived by the alleged fraudulent representations. All the precedents formally alleged that the complaining party was deceived in fact (Lefler v. Field, 52 N. Y.).

V. For the reason stated in Grannis v. Clark, and Lefler v. Field, *supra*, the court cannot turn this defense into a valid allegation of counter-claim, and thus sustain it as such. Treated as a counter-claim, it does not allege facts sufficient to constitute a cause of action (*Co. Pro.* § 150, subdv. 1; *C. C. P.* § 495, subdv. 5). But the defendant having compelled us to deal with

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this part of the answer as a bar, it would be unduly favoring him to turn it into a counter-claim, and would be putting us out of court for not having replied to it, unless leave were given to reply *nunc pro tunc*. Besides, turning it into a counter-claim would be introducing a new cause of action, and sustaining the demurrer to it as a defense (*Edgerton v. Page*, 20 *N. Y.* 284).

VI. The reply shows that the plaintiffs innocently forgot that their lease expired February 1, 1876, and themselves notified the defendant, who thereupon did not rescind, but continued in possession under a new understanding. A party seeking to rescind a contract must act at once when the cause is discovered; if he goes on under the contract or negotiates, he loses the right to rescind (*Lawrence v. Dale*, 3 *Johns. Ch.* 23, 41; affirmed Ct. of Errors as *McNevin v. Livingston*, 17 *Johns.* 437). He must rescind not only at once but *in toto* (*Wheaton v. Baker*, 14 *Barb.* 594; *Bruce v. Davenport*, 1 *Abb. Ct. App. Dec.* 233; *S. C.*, 3 *Keyes*, 474).

VII. The cases show (particularly *Bruce v. Davenport*) that fraud is no defense, without rescission and restoration immediately upon its discovery. It is necessary to allege such restoration where the defense is rescission for fraud (*Springer v. Dwyer*, 50 *N. Y.*; *Dubois v. Hennan*, 56 *N. Y.* 674).

VIII. The defense demurred to admits the indenture of lease dated March 18, 1875, and taking possession under it, and liability for the rent demanded; but it represents that "early in March" (of course prior to the lease) the lessor falsely and fraudulently represented that he had title until May 1, 1876. The counter-claim alleges that the indenture contained a covenant for quiet enjoyment. The defense does not contain this allegation; but it is unnecessary, because every lease implies a covenant for quiet enjoyment (*The Mayor, &c. v. Mabie*, 13 *N. Y.* 531). Now, inas-

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much as a covenant for quiet enjoyment extends to the possession only, and not to the title (*Whitbeck v. Cook*, 15 *Johns.* 483), a false representation by the lessor as to the duration of his own term is immaterial, provided he had title sufficient to put the lessee in possession of the premises, and might perform his covenant for quiet enjoyment. *Non constat* but that his lease, although expiring on February 1, 1876, contained a right of renewal; or without such provision, *non constat* but that he might have protected the possession of his tenant by new terms with the landlord. This defense is defective, therefore, in not alleging that the damage set up was on account of the alleged false representation prior to the lease, that the plaintiff's lease did not expire until May 1.

BY THE COURT.—CURTIS, Ch. J.—The plaintiff's demurrer is on the ground, that the defendant's first defense does not state facts sufficient to constitute a defense.

The action is to recover \$875, rent for a quarter ending February 1, 1876. The answer contains two defenses, separately numbered and stated, the first of which it designates "a first defense," and the second of which it designates "a second defense and counterclaim." Our consideration is confined to the first defense. The first defense is, that the plaintiffs, with the intent of inducing defendant to accept the lease, declared or falsely represented to the defendant that the plaintiff's lease of the premises leased to the defendant, expired May 1, 1876, whereas they well knew their lease expired February 1, 1876; that defendant accepted the lease relying upon these representations, which were made by plaintiffs with intent to defraud defendant into accepting the lease, and went to great expense in painting the inside of the premises for the purpose of carrying on the general importing fancy

Opinion of the Court, by CURTIS, Ch. J.

goods business, for which purpose the premises were expressly leased. Also that defendant was obliged to move out of the premises, February 1, 1876, and rent a new store at an advanced rent, at a great loss of custom and expense, to his damage \$2,500.

This defense is insufficient as a bar to the plaintiff's claim, and does not raise the question of fraud, as it omits alleging that the defendants were deceived by the alleged fraudulent representations. That the defendant was in fact deceived by such representations is the very gist of a defense of this character, and when not alleged, it cannot be supplied by inference or presumption (*Lefler v. Field*, 51 N. Y. 621).

This defense is also insufficient in not alleging that the defendant was obliged to move on February 1, on account of the alleged false representation, as well as in omitting to allege any damage therefrom.

At the argument, no point was presented by the appellant to sustain the position that this defense was sufficient as a bar to the plaintiff's claim. On the contrary, it was urged on the part of the appellant, that it was a counter-claim, and was good as such.

If these alleged false representations, pleaded as a defense, are insufficiently pleaded as such, there is an obvious difficulty in construing the same allegations as constituting a good cause of action in the defendant's favor against the plaintiff, and enforcing it as such. There is an omission in the answer to designate or intimate in any way that the defendant intended to make, what he there calls "a first defense," a counter-claim. If the defendant meant it for a counter-claim, he should have said so, and not called it something else. A defendant cannot thus mislead his opponent, and then take advantage of it, by insisting that it is a counter-claim, if the exigencies of the litigation render that construction of it desirable. The code contemplates no such anomaly in pleading, but intends that

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a plaintiff shall have a reasonable notice when a defendant makes a personal claim against him, so that he may have an opportunity to prepare for it at the trial (*Bates v. Rosecrans*, 37 *N. Y.* 412).

The order appealed from should be affirmed with costs, but with leave to the defendant to amend the answer within twenty days on payment of costs.

SANFORD, J., concurred.

PHILIP FRANKLIN, PLAINTIFF AND APPELLANT,
v. JULIUS CATLIN, JR., ET AL., DEFENDANTS
AND RESPONDENTS.

STAY OF PROCEEDINGS.

In the case at bar the plaintiff recovered a judgment against the defendants for damages caused by the unlawful taking, &c., of plaintiff's property, under an attachment issued in an action, brought by the defendants, in the supreme court, in which action the complaint was dismissed and an appeal taken. Pending this appeal the present action in this court was commenced, resulting in the judgment above-mentioned, from which the defendants have appealed, and stayed execution by an undertaking. Since such judgment in this court, the supreme court at general term has reversed the judgment at circuit, and ordered a new trial, thus restoring the attachment;

HELD,

a proper case for an order staying plaintiff's proceedings in the action in this court, until final judgment in the action in the supreme court.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided January 7, 1878.

Opinion of the Court, by CURTIS, Ch. J.

Appeal by the plaintiff from the order of the special term, staying his proceedings until final judgment in an action pending in the supreme court, wherein the defendants are plaintiffs and this plaintiff is defendant.

Charles Wehle, for appellant.

Erastus S. Ransom, for respondents.

BY THE COURT.—CURTIS, Ch. J.—The plaintiff in this action recovered a judgment for \$2,467.04 against the defendants, for an alleged unlawful taking and detention of his stock of goods, by virtue of an attachment of the plaintiff's property, in a suit brought by the defendants in the supreme court.

At the trial of the action in the supreme court, the complaint was dismissed, and the plaintiff appealed. Pending this appeal the present action in this court was commenced and brought to trial, resulting in the judgment above-mentioned against the defendants, and from which they have appealed and stayed execution by an undertaking. Since such judgment in the superior court, the supreme court at general term has reversed the judgment at the circuit and ordered a new trial, thus restoring the attachment.

It is but just that the defendants, in the suit in this court, should have the protection of the attachment in the supreme court, if that was lawfully issued and proceeded upon, and not be prejudiced by the judgment upon the verdict at the circuit, which was afterwards reversed. The plaintiff in this court has the security of his judgment and the undertaking, during the stay awarded by the order appealed from, until the final judgment in the supreme court. It would be palpably erroneous to subject the defendants in this court to damages for their acts under an alleged void attach-

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ment in the supreme court, which attachment that court has, since the trial here, held to be valid, and to authorize the acts complained of as done under it.

The order appealed from is in accordance with the views often expressed, both of this court and the supreme court. "The court which first acquires jurisdiction should dispose of the whole matter. Any other court in which subsequent proceedings are taken for the *same purpose*, should, as well from feelings of amity as from a desire to avoid a conflict of jurisdiction, restrain the further prosecution of the second action" (McCarthy v. Peake, 9 Abb. 164; Litchfield v. Smith, 7 Robt. 306).

The power of staying proceedings should be exercised in consistency with the due protection of the legal rights of all parties, and with the spirit expressed in the opinions in the cases above cited.

The order appealed from should be affirmed, with costs.

FREEDMAN, J., concurred.

FREDERICK P. SMITH, PLAINTIFF AND RESPOND-
ENT, v. JOSEPHINE S. SMITH, DEFENDANT
AND APPELLANT.

APPEAL FROM ORDER.

The consideration of the general term must be confined to the papers that the order states were read on the motion.

If in fact papers not recited in the order were read on the motion, the defendant before appealing should have applied to the court to have the order amended in that respect.

ALIMONY.

The party entitled to the same payable in installments, by

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order of the court, can release and discharge her claim therefor, in full and in advance, for a stipulated sum ; and where such a release had been made, and subsequently the party making the same moved the court to set it aside, and on the hearing of the motion, no allegations were made of fraudulent practice, or artifice to induce the party to execute the release, nor facts appeared to impeach the honesty and good faith of the transaction, the court should deny the motion, and refuse to set aside the release.

Before CURTIS, Ch. J., and VAN VORST and FREEDMAN, JJ.

Decided January 7, 1878.

The action was for a dissolution of the marriage bond. On May 13, 1876, an order was made at the special term, on the defendant's application, that the defendant have sixty dollars to be paid to her or her counsel for the defense of this action, and that she be allowed the sum of \$3.50 per week, as alimony herein.

On June 26, 1876, the defendant signed and delivered to the plaintiff a receipt and release in writing in the words following :

SUPERIOR COURT OF THE CITY OF NEW YORK.

FREDERICK P. SMITH

v.

JOSEPHINE S. SMITH.

Received New York, June 26, 1876, from Frederick P. Smith, the plaintiff herein, one hundred dollars, the same being paid to me in advance and at my request, and is in full of all alimony to which I am or may at any time hereafter become or be entitled to under the order of this court in this action bearing date 13th day of May, A. D. 1876 ; and in consideration thereof I

Opinion of the Court, by VAN VORST, J.

hereby release and discharge said plaintiff from any further payment of alimony under said order or otherwise ; and I stipulate and agree that no application shall be made by me, or on my behalf, at any time hereafter, for alimony or expenses in this action, and that an order may be entered in this action at any time by plaintiff discharging him from all further payments thereof.

JOSEPHINE S. SMITH.

A motion was afterwards made by the defendant at special term for an order setting aside the release, which was denied.

From this last order this appeal is taken.

Hal Bell, counsel, for appellant.

W. E. Birdsall, counsel, for respondent.

BY THE COURT.—VAN VORST, J.—The order from which this appeal is taken, recites that the papers read on the motion to set aside the release, were the petition of the defendant's attorney, notice of motion, and the affidavit of John S. Woodford. We must be confined in considering this appeal to those papers.

If other papers were in fact used on the motion, not mentioned in the order, before appealing the defendant should have applied to have the order in that respect amended.

But in the form in which the matter comes before us, we are to assume that the order correctly states the papers used on the motion.

There is no allegation that the defendant was induced by any fraudulent practice or artifice to execute this release.

In the absence of such allegations the presumption is that it was voluntarily executed, and that it was for the defendant's advantage to receive the sum of \$100

Opinion of the Court, by VAN VORST, J.

at the time in advance, and in full, of all alimony to which she might at any time become entitled, under the order of May 13, 1876.

At the time this money was paid a small amount of alimony only had accrued. It might be that from death, or other legal cause, thereafter arising, the defendant's claim might suddenly terminate. The allowance was only temporary, and it might be that on final judgment she would not be entitled to it.

It was competent for her to agree to take a gross sum in lieu of all claims for alimony under the order.

As there is no fact to impeach the honesty or good faith of the transaction, the judge before whom the order appealed from was made, was justified in refusing to set the release aside.

A further construction of the release may, however, raise the question whether or not anything was released except alimony provided for in the original order.

The rule indicated in *Jackson v. Stockton* (1 *Cow.* 122), that the portion of the release in respect to "expenses in the action," is qualified by the recital with respect to "alimony," in the former part of the release.

The order appealed from is affirmed without costs, and without prejudice to the defendant's right to apply by motion for the payment of such expenses in the action as she may be entitled to, in order that she may bring the action to a close.

CURTIS, Ch. J., and FREEDMAN, J., concurred.

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CHARLES OFFINGER, ET AL., PLAINTIFFS AND
RESPONDENTS, v. DAVID R. DE WOLF, IM-
PLEADED, &C., DEFENDANT AND APPELLANT.

PARTITION.

PRACTICE IN CASES OF, INCLUDING INTERLOCUTORY PROCEEDINGS
AND FINAL JUDGMENT.

The decision of the general term in this case substantially approves of all the proceedings in the action in detail, to and including final judgment; and therefore, reference is made to the statement of the case, and the opinion of the court, for the numerous points involved therein.

Before CURTIS, Ch. J., VAN VORST and SANFORD, JJ.

Decided January 7, 1878.

Appeal from an order of FREEDMAN, J., denying, with costs, a motion to vacate a judgment for irregularity.

The plaintiffs are children of the late Johanna Christian Offinger, who, upon his death, left them, by will, certain real estate in the cities of New York and Hoboken, subject, however, to the life estate of their mother, his widow.

She afterwards died intestate.

At the request of the plaintiffs, defendant, De Wolf, thereupon took out letters of administration, upon the estate of the late Mrs. Offinger.

Plaintiffs, at about the same time, conveyed to Mr. De Wolf, by quit-claim deed, all the real estate devised to them by their deceased father, and received in return a declaration of trust, wherein it was stated that the real estate so conveyed, was to be held by the said defendant, not as his own, but for the objects, trusts and purposes mentioned.

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Mr. De Wolf accordingly proceeded to act as such administrator and trustee.

On April 27, 1875, plaintiffs began this action against De Wolf, Wenzel Hruza (husband of a deceased daughter of the late Johanna Christian Offinger), and John, Fredericka, and Maria Hruza (infant children of the said Wenzel Hruza), setting up the interests of the several parties to the action in the real estate above-mentioned; also the execution of the quit-claim deed and declaration of trust.

It was further alleged, that there were certain irregularities in the execution of the instruments mentioned, and that Mr. De Wolf had been guilty of misconduct in his dealings with the plaintiffs.

The complaint prayed for a partition of the real estate, and the appointment of a receiver of the property, rents, and money belonging to the plaintiffs during the continuance of the litigation; for an injunction restraining De Wolf from interfering with the real estate or its proceeds; that De Wolf might be compelled to account with plaintiffs, concerning the premises and the trusts. "And that the defendant, De Wolf, may be adjudged to be personally responsible for any losses which the plaintiffs may have sustained by breaches of the trust aforesaid."

"And that plaintiffs may have such other or further relief in the premises as may be just and proper."

The defendant, De Wolf, answered such of the allegations of the complaint as affected him.

On November 4, 1875, the cause came on for trial before FREEDMAN, J., at special term.

An interlocutory judgment was entered, stating certain facts and conclusions of law, and referring it to Henry Wehle, Esq., to take proof of the interests of the several parties in the real estate, and the condition of the premises; and also to "take and state an account of the rents of the premises mentioned and described

Appellant's points.

in the complaint, received by David R. De Wolf, and the disposition thereof by him."

By the decree "It was further ordered that *the question of costs, as well as all other questions*, be reserved until the coming in of the report and hearing for further directions."

Having taken proof as directed, the referee reported the same to this court.

Meanwhile, the defendant, De Wolf, had accounted as administrator.

It appeared, upon examination before the surrogate, that Mr. De Wolf had mingled the moneys arising from the rents of the real estate with those which were the proceeds of the late Mrs. Offinger's estate, and in making payments to the several plaintiffs had not discriminated between the different funds. And the surrogate found that defendant had paid to several of the plaintiffs amounts of money largely in excess of their respective shares in their late mother's estate, and that this excess was properly a charge upon the real estate.

Defendant then applied to the court for leave to set up these facts by way of supplemental answer.

An order was made granting the relief asked for, and referring the matter again to Mr. Wehle, and directing "that upon the coming in of the supplemental report, *the action may be noticed for final hearing and determination* at a special term of this court."

After the supplemental report came in, the cause was regularly noticed for trial, and was brought on before his Honor Judge SANFORD at the June term.

After the trial, and without procuring from the court any written findings of facts or conclusions of law, the plaintiffs entered a final judgment.

Defendant DeWolf thereupon moved to vacate the judgment for the irregularities mentioned in the notice of motion.

The motion was denied, and the defendant appeals.

Appellant's points.

Erastus Cooke, of counsel, for appellant, urged:—

I. It was irregular to enter judgment, without having first procured and filed a written decision by Mr. Justice SANFORD, containing a separate statement of the facts found, and the conclusions of law. This was necessary under the old, and is required by the new Code of Procedure (*Old Code*, § 267; *New Code*, §§ 1022, 1228; *Wright v. Sanders*, 28 *How. Pr.* 395; *Van Steenburgh v. Hoffman*, 6 *Id.* 492).

II. Such a decision as the law requires, is necessary in order that the defendant may present the case to the appellate court. The only means for reviewing the decision at the trial, is by excepting to the facts found, and the conclusions of law. Here is nothing to which we can except (*Bridger v. Weeks*, 30 *N. Y.* 329; *Leland v. Cameron*, 31 *Id.* 115; *Doty v. Carolus*, *Id.* 547).

III. The plaintiffs' argument is, that in view of the reference to Mr. Wehle, and his report, there was nothing for the court at special term to try, and hence, no written decision containing findings and conclusions was required. This is a fallacy. 1st. It is only upon the report of a referee appointed to hear and determine the whole issue, that judgment may be entered (*Code of Pro.* [old] § 272). Where the referee is merely to report the facts, the report has only the effect a special verdict (*Id.* § 272). In such case the judgment is left to the court (*Id.* § 260). 2nd. Here the court, in the first instance, found certain facts, and referred other specific questions, at the same time stating, that "*the question of costs as well as all other questions*," are reserved until the coming of the referee's report. This report then, operated as a special verdict upon the questions of fact referred, and no further. The second order was that the referee report upon a single question, and that "upon the coming in of the supplemental report, *the action may be noticed for final hearing and determination.*" (N. B.—The

Respondent's points.

words "to hear and determine," in this order, are surplusage, inconsistent, extra-judicial and void. The issue made by the supplemental answer was simply as to certain payments alleged by De Wolf to have been made by him. This only was referred, and it is too plain for argument, that a referee appointed to pass upon one of several questions, cannot "*hear and determine.*") 3rd. It follows that after the reports were both before the court, and the cause was ready for a final hearing, numerous questions (*i.e.*, the alleged misconduct of the trustee, his right to costs, and other issues raised by the pleadings), were still undetermined. *And even as to the facts actually found by the referee, there are no conclusions of law stated.* This the court was bound to do, and no judgment could properly be entered until that duty had been discharged.

Benjamin T. Kissam, of counsel, for respondents, urged :—

I. The issues of fact were tried by the court, in November, 1875.

Its decision was then given, containing a statement of facts and conclusions of law (See §§ 250, 252, 267 of *Code of Procedure*). This decision was filed, and in pursuance of it, and the order of the court entered thereon, the reference as to title, and as to the rents received and disbursed by De Wolf proceeded.

II. The report of the referee was made in August, 1876, and no exceptions being taken, it became absolute after eight days (Rule 39).

III. The court in March, 1877, allowed the defendant De Wolf to set up certain alleged payments which he claimed were not allowed him, either in his accounting before the surrogate, or by the referee in this action, but required him to proceed with great despatch before the referee, and pay the expense out of his own private moneys.

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IV. The order of reference was limited to "such payments as were disallowed by both the surrogate and the referee, and were made in good faith, and for the allowance of which clear equitable grounds exist." The referee reported payments to some five of the plaintiffs, in the aggregate amounting to \$2,177.58, which was nearly the full amount claimed. There was no exception taken to this finding of the referee, and to that extent the report became absolute under the rule (see Rule 39).

V. The material issues in the action were settled in November, 1875. The report of the referee in August, 1876 (so far as De Wolf was concerned), not excepted to, settled the account between the plaintiffs, the Hruzas and De Wolf. The second report of the referee, in May, 1877, made a material deduction in De Wolf's favor, from the amount charged against him in the first report, to which he did not except, and plaintiffs did not except, and that under the rule became absolute. The only question raised by the exceptions of the defendant De Wolf, was in respect to the interest on payments. This was a question of law.

VI. The question of interest being disposed of, there was nothing left to be done by the court but to settle the form of the judgment. It was unnecessary and improper for the court to make any decision containing the facts found, and conclusions of law. The provisions contained in the "Code of Civil Procedure" have no application to the case (see §§ 1022, 1228).

VII. If any irregularity has occurred the judgment is not affected thereby, and should not be disturbed (See *Code of Civil Procedure*, § 721, subds. 11, 12, also § 722).

BY THE COURT.—VAN VORST, J.—This is an appeal from an order denying a motion to vacate a judg-

Opinion of the Court, by VAN VORST, J.

ment for an alleged irregularity. The action, which is in partition, came on to be tried before the Hon. JOHN J. FREEDMAN, at a special term of this court, November 4, 1875, without a jury.

The learned judge determined the issues, and made his decision thereon in writing, finding certain facts and conclusions of law.

But he directed a reference to a referee named by him to take proof of the interests of the parties, and to report whether the premises were so situated as that an actual partition could not be made. He also directed the referee to ascertain the liens upon the premises, and to take an account of rents, &c. The question of costs, as well as other questions, were reserved until the coming in of the referee's report.

After such finding of facts, which disposed of all the issues, no other findings of fact were necessary to enable the defendant to obtain a review of the judgment finally entered in the action.

The further proceedings in court in the action, would be founded upon the referee's report upon the matters referred to him.

The findings of facts and conclusion of law, the result of the trial of November, 1875, could have been excepted to, as well as the referee's report. These latter exceptions could be disposed of by the court, as it appears they were, when application was made for a confirmation of the referee's report. And the appeal from the judgment and order of confirmation would bring up for review all the exceptions.

The matter contained in the supplemental answer, which was allowed to be filed, presented no new issue, requiring additional findings of fact by the judge. The matter involved in the supplemental answer, which affected the accounts of one of the parties, was also referred to the same referee, and was passed upon by

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him, and was the subject of adjudication, when the report was before the court for confirmation.

We fail to discover any irregularity in entering up the judgment without findings and conclusions other than those made by Judge FREEDMAN. If exceptions have been taken to such findings and conclusions, and to the order or judgment of confirmation of the referee's report, the defendant can raise all legal objections upon the appeal from the judgment.

The question of costs was determined by the judge, by the order made when the report was before him on the final hearing. That question was then properly before him upon the findings and conclusions of Judge FREEDMAN and the referee's report.

The order appealed from should be affirmed with costs.

CURTIS, Ch. J., and SANFORD, J., concurred.

MADISON AVENUE BAPTIST CHURCH, PLAINTIFF AND RESPONDENT, v. BAPTIST CHURCH IN OLIVER STREET, DEFENDANT AND APPELLANT.

SUPPLEMENTAL ACCOUNTING UNDER DECREE.

In the case at bar, the decree directed the surrender of certain premises to the plaintiff, upon the payment by him of a sum found due defendant, as of May 31, 1875, under an accounting embraced in said decree ; which decree also contained a provision, permitting the plaintiff to apply to the court upon the foot thereof, for an account of the rents and profits from said May 31, 1875, to the date of the surrender of said premises, but the said decree contained no express provision for the recovery of

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the amount which should appear due upon the said accounting. The plaintiff having paid the said sum due the defendant, and the said premises having been surrendered to him as directed,—*Held*, this only operated to satisfy the judgment, *pro tanto*. It did not cut off plaintiff's right to rents and profits after May 31, 1875 ; nor did it deprive the court of jurisdiction to enforce payment of the amount thereof, when ascertained in the manner prescribed in the decree.

The omission of an express provision for the enforcement of the recovery of said amount is of no effect. The equitable powers of the court are not so circumscribed, as that a mere omission to declare them in advance, shall preclude their exercise in a case distinctly provided for by a decree.

The principles of the supplemental accounting having been settled by the previous orders and judgment of the court, and the general term having affirmed said principles, they must be deemed conclusively settled for the purposes of this case, so long as the judgment at general term remains unreversed.

Before SANFORD and FREEDMAN, JJ.

Decided January 7, 1878.

By the judgment rendered at special term, August 3, 1875, the defendant was directed to surrender to the plaintiff the possession of the premises described in the complaint, upon payment to it, within one month, of the sum of \$4,507.16, which had been found and reported to be due and owing by plaintiff to defendant, as of May 31, 1875, less the sum of \$1,010, being half of the disbursements paid by plaintiff for referee's fees. The judgment further directed that upon such payment the plaintiff recover such possession and have execution therefor.

It was further provided that the plaintiff should be at liberty to apply to the court, on the foot of such judgment, for an account of the rents and profits of the premises from May 31, 1875, to the time of delivery of the possession thereof ; but the judgment contained no express provision for the recovery by either party of

Appellant's points.

the amount, which, upon such accounting, should appear to be due from the other.

The judgment was affirmed at general term, November 6, 1876.

Pending an appeal by defendant to the court of appeals, no stay of proceedings having been obtained, the plaintiff, on November 13, 1876, paid the amount specified in the judgment, and took possession of the premises.

On March 22, 1877, pursuant to the reservation contained in the judgment, a reference was ordered to take the supplemental account of the rents and profits, from May 31, 1875, when the account embraced in the judgment ended, down to November 13, 1876, when possession of the premises was surrendered. Upon such supplemental accounting, the sum of \$9,681.90 was found and reported to be due to the plaintiff, and the referee's report, after a hearing of exceptions thereto, was duly confirmed, by order entered at special term, July 27, 1877. On the same day, an order was made and entered reciting the judgment and the reservation to the plaintiff therein contained, of liberty to have such supplemental account taken, the subsequent proceedings pursuant thereto, including the confirmation of the referee's report thereon, and directing the payment by defendant of the amount therein reported, with costs of the reference.

The case is now before the court upon the appeal of the defendant from each of such orders.

William R. Martin, for appellants, urged:—I. The judgment contains no provision for the recovery by the plaintiffs against the defendants of this account.

II. The voluntary payment by the plaintiffs to the defendants of the amount adjudged due, as of May 31, 1875, with full knowledge of all the facts, is a liquidation, and a bar to any further recovery (*Stenton v.*

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Jerome, 54 *N. Y.* 485). On such payment, they enforced the execution of their judgment, and have exhausted their rights under it. They recovered in ejectment, with mesne profits, to be set off against the claim of the defendants for moneys advanced, and for which they had an equitable lien. At a period when, on the account as fixed in the judgment, the plaintiffs owed defendants \$3,810, they paid it, and took possession on execution. This is their own voluntary liquidation of the account, and enforcement of the judgment. In the absence of any provision for recovery of the amount that might be found due on the subsequent accounting, they can have no relief in respect thereto.

III. The defendants are entitled to have the expenses of conducting public worship allowed against the pew rents charged to them. At general term, November, 1876, CURTIS and VAN VORST, JJ., the grounds stated in affirming the judgment, were: That there was a defect of proof. That the expenses of conducting public worship might be chargeable against other sources of income than the pew rents. That it was not proved that these expenses of conducting public worship were necessary, and formed the consideration for which the pew rents were paid. These facts now appear in evidence. In the former report, the income of the defendants collected from other sources did appear; and it now appears, that for fifteen years, prior to 1877, the collections and aids towards the expenses of maintaining public worship, have been usually paid over to the defendant's society or corporation; and that the expenses of maintaining public worship have been defrayed by these collections and contributions, as well as by pew rentals, before, and also after May, 1875, *i. e.*, during the whole period covered by the accounting. It further appears, that, during the whole period, the defendants

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had no other sources of income than these pew rents, and these special collections, and that these special collections, of whatever kind, were only resorted to, to make up the deficiency of income from pew rents. It also appears that the pews, from which the rents were derived, were in the main audience room of the church ; that this room was opened solely for public worship on Sunday, mornings and evenings ; that it was locked up from the pew-holders, and that they did not have access to the pews at other times. That the exclusive use of the pews, during public worship, was the only use the pew-holders had of their pews for their rents, and that this was the consideration given by the church to these pew-holders for the payment of their rents. That preaching and music was supplied on all occasions of public worship, and that without them, and without light and heat, and the services of the sexton, the pews could not have been rented. And that this was in accordance with the usage of Baptist churches in New York city. In the management of the church in all these aspects, there was no change after May 31, 1875. They were the same as before, and the same as they had been in the plaintiffs' church before the union. Upon these facts the defendants rely in support of their argument, that the expenses of maintaining public worship should be deducted from the pew-rents, in the account against them for use and occupation. In the order of management, comes, first, the expenses of maintaining public worship, as the necessary condition of renting pews ; secondly, the collection of pew rents, for the use of the pews during public worship ; thirdly, the making up the deficiency, where the pew rents fall short of meeting the expenses, by special collections.

Addison Brown, of counsel, for respondent, urged :
—I. This supplemental account was taken by the referee in the same manner, and on exactly the same

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principles as the former account embraced in the judgment. The order of reference expressly so directs. These principles have been affirmed at general term by this court in this case, and the defendant is now an appellant therefrom in the court of appeals. As respects this court, the matter is adjudged and cannot be further argued (41 *N. Y. Sup.* 369).

II. The defendant endeavored to prove some additional or different facts, with a view to change the principles of taking the account. The evidence was allowed, though objected to by the plaintiff; but *nothing material was proved different from the former state of facts*. The witness, Harris, says: "*there was no material change.*" But if a change had been proved, it could not affect the principles of the accounting, for these were necessarily *fixed by the judgment, and by the order made upon the trial of the cause*. Any different rule would subject the judgment to liability to a partial reversal as often as any supplemental reference arose upon it. The decree cannot be thus changed "in the minutest particular" (*Daniel Ch. Prac.* 1506 * to 1511, * 1203; * 1 *Russ.* 329, 530).

BY THE COURT.—SANFORD, J.—The surrender of possession, upon payment of the amount due from plaintiff to defendant, as of May 31, 1875, according to the account which had been taken and stated as of that date, only operated to satisfy and discharge the judgment *pro tanto*. It did not cut off the plaintiff's right to the rents and profits which accrued after May 31, 1875, when the account upon which the judgment was based ended, and November 13, 1876, when possession was delivered; nor did it deprive the court of jurisdiction to enforce payment of the amount of such rents and profits, when ascertained in the manner prescribed by the judgment. The reservation to the plaintiff, in the judgment, of liberty to take such sup-

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plemental account would be nugatory, but for the implication, necessarily involved, of reserved cognizance and jurisdiction over the cause, to the extent of rendering full and complete satisfaction, between the parties, as their respective rights should upon such accounting be made to appear. The equitable powers of the court are not so circumscribed and fettered as that a mere omission to declare them in advance shall preclude their exercise, in a case distinctly contemplated and provided for by a judgment. The intent to adjudicate finally upon the subject matter in controversy is clearly inferrible from the terms of the reservation, and to refuse such adjudication would be tantamount to a denial of justice.

The principles upon which the supplemental account was taken, were settled and determined by the previous orders and judgment of the court. Those principles have been affirmed, at general term, and must be deemed conclusively settled, for the purpose of this case, so long as the judgment rendered at general term remains unreversed by the court of appeals. The evidence adduced on the supplemental accounting was not such as to render inapplicable the principles upon which the original accounting was directed to proceed.

We are therefore of opinion that each of the orders appealed from should be affirmed with \$10 costs.

FREEDMAN, J., concurred.

Statement of the Case.

ALONZO CARR, PLAINTIFF AND APPELLANT, v.
THE MAYOR, &c., OF NEW YORK, DEFEND-
ANT AND RESPONDENT.

JUDGE'S CHARGE TO THE JURY AND REFUSAL TO CHARGE
AS SPECIFICALLY REQUESTED.

The charge, as delivered, fairly submitted to the jury all the questions of fact which were presented for determination, and no exception was taken, and, afterwards, the court refused to charge specifically as requested by counsel.

Held, that there was no error in this refusal, because, although the charge, as given, failed to adopt the precise language of the propositions, to charge, so requested, yet they were substantially embodied in the charge as delivered.

EVIDENCE.

Its reception without objection or motion to strike it out, or for instruction to the jury to disregard it, is not error.

In this case, an objection was made to a preliminary question as to whether the witness had any conversation with a party in regard to the subject-matter of the action. The court ruled that the question might be answered, in view of further evidence being given in regard to certain facts in the inquiry of which this question was preliminary, at the same time ruling, that if certain other facts were sought to be proved, they would be ruled out. This question was answered simply in the affirmative. The subsequent questions and answers were not objected to by the party objecting to the preliminary question, nor did he move to strike out the evidence thus received, or move the court to direct the jury to disregard the same, although the subsequent evidence should have been ruled out if objected to, or should have been stricken out, or the jury directed to disregard it, by the court, if such a motion had been made. This evidence was clearly of that character, which the court had intimated in its ruling on the first objection, if objected to, would be ruled out.

Held, that the court ruled correctly in the first instance. By not objecting, in any form, to the reception of the subsequent evidence, the party precluded himself from subsequently claiming (on the appeal) that such evidence was erroneously received.

Statement of the Case.

Before CURTIS, Ch. J., and SANFORD, J.

Decided January 7, 1878.

Appeal by plaintiff from a judgment entered on a verdict in favor of defendants.

The action is upon a negotiable certificate of indebtedness, of which the plaintiff claims to be the lawful owner and holder, by virtue of its indorsement to him, by the payee and another, for value and before maturity.

The certificate purports, on its face, to have been issued by the board of trustees of the town of Morrisania, under date of November 12, 1873, and, by its terms, the said board promise to pay to the order of Michael Donohue, \$500, with interest, in one year from the date thereof.

The liability of the defendants for the debts of said board, by virtue of the statutes under which the town of Morrisania became part of the city and county of New York, is not in dispute.

Upon the trial, it appeared, without contradiction, that the said certificate was never duly issued, but was surreptitiously abstracted from the office of the treasurer of the town of Morrisania, by one William Leslie, who afterwards procured it to be indorsed by Michael Donohue, the payee, and, thereupon, himself indorsed and delivered it to the plaintiff.

The evidence as to the circumstances under and the consideration upon which Leslie transferred it to plaintiff, was conflicting.

The court submitted to the jury, without objection, the questions, (1) whether the plaintiff, at the time of its transfer and delivery to him, had notice of the fact that Leslie had feloniously abstracted it from the office of its legal custodian ; and, (2) whether, if he had no

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notice of that fact, he actually paid or parted with any valuable consideration on the faith thereof.

The court charged, in substance, that the burthen of proof was upon the plaintiff to show that he purchased the certificate in good faith, and without notice of its invalidity, and parted with actual value on the faith of its transfer to him. That, if he had notice, he could not recover, no matter what he paid therefor. That, if he had no notice, he could only recover the value actually paid by him as the consideration, and on the faith of such transfer.

No objection was made, and no exception was taken to the charge, as delivered, but plaintiff's counsel requested the court to charge in terms, first, that the certificate in suit was a negotiable instrument on its face ; and, second, that the negotiable paper of municipal bodies was governed by the same principles as that of private individuals.

To the refusal of the court to charge the jury in the terms of these requests, plaintiff's counsel duly excepted, and exception was also taken to the ruling of the court in admitting certain evidence, more particularly referred to in the opinion of the court.

The jury found for the defendants ; and from the judgment entered on their verdict, the plaintiff now appeals.

James R. Angel, for appellant.

William C. Whitney, corporation counsel, and *A. J. Requier*, for respondent.

BY THE COURT.—SANFORD, J.—The charge of the court fairly submitted to the jury the questions of fact which were presented for determination, upon the pleadings and evidence ; and such submission appears

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to have been accompanied by appropriate instructions as to the law of the case. No objection was made, and no exception was taken to the charge as delivered; but it is claimed and insisted that the judgment should be reversed, and a new trial ordered for error on the part of the court, in refusing to charge that the certificate of indebtedness, upon which the action was brought, is a negotiable instrument upon its face; and that the negotiable paper of municipalities is governed by the same principles as that of private individuals. Although the court failed to adopt the precise language of these propositions, they were both substantially embodied in the charge as delivered. The court expressly directed the attention of the jury to the fact that the certificate was payable to the order of Michael Donohue, and that, if treated, in all respects, like any other negotiable instrument, like a promissory note, before the plaintiff could recover thereon, he must show that he is a purchaser thereof without notice and for a valuable consideration. In thus comparing the certificate to "any other negotiable instrument," as, for instance, a promissory note, the court charged, in substance, that such was the nature and character of the instrument in question. Its negotiability was assumed throughout the entire charge, and the law appropriate to negotiable commercial paper, was laid down for the guidance and government of the jury, as applicable to the case in hand. No distinction was suggested or recognized between the negotiable paper of a municipality and that of an individual, and the instructions to the jury clearly and accurately stated the principles of law applicable to the particular instrument in suit, irrespective of any question as to the corporate or individual capacity of its maker. The requests embodied a mere abstract proposition which was fully adopted by the court, and effectually applied to the present controversy by specific instruc-

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tion as to the particular certificate of indebtedness which constituted the subject-matter of the action. Under these circumstances, the omission or refusal to adopt the plaintiff's propositions, in the precise language of the requests, and to charge the jury in their precise terms, cannot be assigned as error. An exception to such refusal will not be sustained.

A more serious question is presented by an exception to the ruling of the court, in permitting the witness, Francis Humbert, to testify as to a conversation between William Leslie and himself, in relation to the certificate in suit, subsequently to its transfer and delivery by Leslie to plaintiff.

After Humbert had testified that he knew Leslie, the following question was put to him :

“Q. Since November, 1873, has any conversation taken place between you in relation to the certificate in the possession of Mr. Carr?”

Carr had previously testified that the certificate came to his possession by transfer from Leslie, about the middle of November, 1873.

The question was objected to, unless the plaintiff was present.

The court stated that mere declarations as to the certificate would be ruled out, but that the fact that Leslie offered it for sale, subsequently to the time when the plaintiff said he bought it, might be proved.

The plaintiff excepted, and the witness thereupon answered, as follows :

“Ans. There has.”

The question was then put :

“Q. What did he say in relation to it?”

To this question no objection was made, and the witness proceeded to relate the conversation, testifying fully and without interruption, not only to the fact that Leslie had asked him to buy the certificate, then in the hands of Carr, but also to what Leslie had told

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him as to the circumstances under, and the consideration upon, which Carr had acquired such possession.

Although the evidence was hearsay, and, as such, objectionable, I am of opinion that its reception, under the circumstances stated, ought not to be regarded as error, constituting sufficient ground for reversal. In permitting the question as to whether or not a conversation had occurred between Leslie and the witness, to be answered, the court committed no error. The error, if any, consisted in the intimation of the court, as to the ruling it would thereafter make with respect to further questions, when the same should be addressed to the witness.

The next question, viz. : "Q. What did he say in relation to it?" clearly called for any declarations as to the certificate, which Leslie might have made to the witness, and an objection to that question, if duly taken, would, doubtless, under the intimation of the court, have been promptly sustained. I think it due to the court that the objection should then have been made. The plaintiff should not have speculated upon the chances of the answer, by permitting the witness to proceed with a detailed statement of the entire conversation, but should have insisted upon such a change in the form of the question, as would have adapted it to the intimation of the court. By allowing the question to be put and answered without objection, when the court had already expressed the opinion that evidence for which it called, was objectionable and inadmissible, the plaintiff precluded himself from subsequently insisting that such evidence was erroneously received. He should, at least, have requested the court to strike it out, or to instruct the jury to disregard it. But however objectionable the evidence may have been, in theory and upon principle, I am of opinion that it could not, practically, have prejudiced the plaintiff, inasmuch as it tended to show that he

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was a purchaser for value, at least to the extent of \$50, advanced to Leslie upon receiving from him the certificate. As the jury failed to find in plaintiff's favor for this amount, they must either have discredited the evidence altogether, as they well might do, in view of the uncontradicted testimony as to the felonious abstraction of the certificate by Leslie, or must have found that the plaintiff had notice of that fact; and in either case, the testimony could not have adversely affected the plaintiff. It had no bearing whatever upon the question of notice.

The judgment appealed from should be affirmed, with costs.

CURTIS, Ch. J., concurred.

JAMES MURRAY, PLAINTIFF, v. THE MAYOR,
&c., OF NEW YORK, DEFENDANT.

STATUTE, UNCONSTITUTIONAL.

Section 9 of chapter 382 of the Laws of 1870, which provides for the appointment and removal of attendants upon courts in the city and county of New York, held to be nugatory and void, because in conflict with the prohibition contained in article 3, section 16, of the Constitution, which provides, that "*no private or local bills, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title.*"

The following cases, cited in the opinion of the court, are decisions in regard to the same statute, to the same effect: *Brennan v. Mayor, &c.*, 47 *How. Pr.* 178; *Berrigan v. Mayor, &c.*, Common Pleas, 1875; *Blunt v. Mayor, &c.*, Common Pleas, 1876.

Before CURTIS, Ch. J., and SANFORD, J.

Decided January 7, 1878.

Statement of the Case.

In the year 1867, the plaintiff was employed by the supervisors of the county of New York, as an attendant upon the supreme court of the State of New York, held in and for the city and county of New York, and continued to perform the duties required of him as such attendant until May 1, 1872. His salary was fixed by the supervisors at \$1,200 per annum, and he was paid for his services, at that rate, until November 15, 1871, when he received from Andrew H. Green, deputy comptroller, written notice to the effect that under and by virtue of section 9, of chapter 282, of the laws of 1870, he was removed as an attendant on the supreme court. Such notice was subscribed "Andrew H. Green, deputy comptroller."

The action was brought to recover \$550, and interest, as compensation for plaintiff's services, as such attendant, from November 15, 1871, until May 1, 1872.

Upon proof of the facts above stated, the learned judge before whom the trial was had, dismissed the complaint, at the instance of defendant's counsel, on the ground that the plaintiff was removed from employment on November 15, 1871, power to remove and appoint attendants on the supreme court having been lawfully conferred on the comptroller by section 9, chapter 382, laws of 1870.

Exception was duly taken by counsel for plaintiff, to the ruling of the court in dismissing the complaint, and also to the refusal by the court to direct a verdict for the plaintiff for the amount claimed.

Such exceptions were thereupon ordered to be heard, in the first instance, at the general term.

Elliot Sandford, for plaintiff, in support of exceptions.

William C. Whitney, corporation counsel, and *D. J. Dean*, for defendant, in opposition.

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BY THE COURT.—SANFORD, J.—If the plaintiff was not duly and lawfully removed from employment as an attendant upon the supreme court by virtue of section 9, of chapter 382 of the laws of 1870, which provides that “attendants on the several courts in the city and county of New York, except police and district courts, shall be appointed and removed, and their compensation fixed, by the comptroller,” it was error to dismiss his complaint.

It is contended on his behalf, that the written notice given him by Andrew H. Green, deputy comptroller, whereby, under date of November 14, 1871, his removal purports to have been effected, was ineffectual for that purpose, and was wholly nugatory and inoperative, (1) because section 9, of chapter 382, of the laws of 1870, is in conflict with the constitutional prohibition upon the legislature, in respect to the enactment of private or local bills, embracing more than one subject (*Const.*, art. 3, § 16), and, (2) because it does not appear that the deputy comptroller had authority to exercise the power of removal, conferred by section 9 upon the comptroller, even if such power could lawfully have been exercised by the comptroller himself. Section 16, of article 3, of the Constitution, declares that “no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title.” The act in which the power of appointing and removing attendants upon the courts in the city of New York is conferred upon the comptroller is a local, although a public act (*Huber v. People*, 49 *N. Y.* 132). None of its provisions relate to matters or persons outside the territorial limits of the county of New York. It is entitled, “An Act to make further provision for the government of the county of New York;” and its object and purpose, as expressed in its title, are to provide the revenues and regulate the expenditure

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necessary for and incident to the carrying on of the county government.

The title of the act, therefore, is in strict conformity with the constitutional requirement. It clearly expresses one subject, and only one, viz., the procurement and appropriation of the necessary "ways and means," for the conduct and support of the government of the county.

If the body of the act embraces other subjects, neither necessarily nor incidentally connected with that thus expressed, the act is nugatory and void, in so far as such other subjects are concerned; unless, indeed, its provisions in regard to them are general and not local, in which case they are valid, notwithstanding their insertion in an act whose other provisions are merely local, and although the title of the act only relates to such other provisions (*People v. McCann*, 16 *N. Y.* 58; *Williams v. The People*, 24 *Id.* 405). If, however, any of its provisions are foreign or irrelevant to the support and administration of the county government, and are local in their application, it may with propriety be said to be a local act, and to embrace more than one subject; and, if such be the case, it violates the constitutional inhibition, and is inoperative and void. The power of appointing and removing the attendants upon the several courts in the city of New York is in no wise incident to or connected with the support of the government of the county.

Inasmuch as the compensation of such attendants is payable out of the county treasury, an appropriation of the county revenues, *pro tanto*, in payment of such compensation, might properly be directed, in the body of the act, as clearly relevant to the subject expressed in its title. But no intent to effect a change in the organization of the several courts held in the city of New York, or in the law which prescribes the manner in which their respective officers and attendants shall be

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appointed or removed, can be justly inferred from the language of a title which merely purports to make provision for the government of the county. Such a change would constitute an appropriate subject for separate and distinct legislation, and would be susceptible of enactment by local bill, only when expressed in its title, and detached from all other subjects of legislation in its body.

The change attempted to be wrought by the ninth section of the act now under consideration is no less foreign to the subject of the act, as expressed in its title, than was the provision in chapter 383, of the *Laws of 1870*, reorganizing the court of special sessions, to the subject of that act. That provision was held by the court of appeals to be void, as in conflict with the requirement of section 16, of article 3 of the constitution (*Huber v. The People, ut supra*). The title of that act was precisely the same as the title of chapter 382, except that it related to the government of the city instead of the government of the county. The case of the *People v. Stevens* (51 *How. Pr.* 103), is also analogous. In that case the court of appeals held that a section of the tax levy act of 1866,—which provided for the continuance in office, for the term of three years from and after the passage of the act, of the engineer and assistant commissioner of the croton aqueduct department,—was void, as in conflict with the constitutional inhibition with respect to local and private acts, contained in section 16, of article 3.

It is understood that the supreme court, in the first department, has twice reached a conclusion adverse to the constitutionality of the provision now under consideration (*Brennan v. The Mayor, &c.*, 47 *How. Pr.* 178), and that the common pleas, in May, 1875, in the case of *Berrigan v. The Mayor*, and again in 1876, in the case of *Blunt v. The Mayor*, adopted similar views. Although not authoritatively binding upon us, the de-

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cisions of these tribunals are entitled to great weight, and should be followed, unless the court is satisfied that their conclusions are erroneous.

In regard to the authority of the deputy comptroller, to exercise the powers conferred by section 9, of chapter 382, of the *Laws of* 1870, it need only be remarked that the office of deputy comptroller was created by chapter 574, of the *Laws of* 1871; and his power to perform the duties belonging to the office of comptroller, among which, if section 9 of chapter 382, of the *Laws of* 1870 is valid, the appointment and removal of court attendants were included, is, by the express terms of that act, made to depend upon a written delegation of authority, from the comptroller, duly filed in the finance department. The case before us contains no evidence of such delegation, and there is no legal presumption in favor of its existence. This point, though pressed upon us at the argument, does not appear to have been suggested at the trial. It was there assumed, for the purposes of the case, that the plaintiff was, in fact, discharged by the comptroller, and there was no intimation on the part of the plaintiff, that such discharge was inoperative, for any other reason than that the authority of that officer to remove him was, in law, inadequate. The court merely held that the power to remove him was lawfully conferred upon the comptroller. If attention had been directed to the fact that the notice was not signed by the comptroller in person, but by his deputy, the missing link in the chain of evidence might have been promptly supplied, and the authority of the deputy to represent his principal been readily established. Exceptions should be so specific as to present plainly the precise question of law intended to be raised. Where errors arise from inadvertence or misapprehension, susceptible of immediate correction, if attention be directed to the oversight, they are rarely regarded as affording suffi-

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cient ground for reversal. We therefore prefer to rest our decision solely upon the constitutional question, presented on the argument. For the reasons suggested in the discussion of that question, the plaintiff's exceptions should be sustained, and a new trial ordered, with costs to abide the event.

CURTIS, Ch. J., concurred.

ALEXANDER CHURCHILL, PLAINTIFF AND RESPONDENT, v. JAMES A. BRADLEY, DEFENDANT AND APPELLANT.

Receipt purporting to be in full, and to be an absolute bar to all claims and demands, is subject to explanation, and does not conclude the party making the same, from proof of facts and circumstances showing, that it was not *in full*, and that there were existing claims and demands *unpaid, although not due* at the time the receipt was given (*Ryan v. Ward*, 48 N. Y. 204 ; *Bliss v. Shwartz*, 65 N. Y. 444).

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

Decided January 7, 1878.

Appeal by defendant from a judgment in favor of plaintiff, entered on the report of a referee, after the trial of issues of fact.

John A. Taylor, for appellant.

Royal S. Crane, for respondent.

BY THE COURT.—SANFORD, J.—The referee has found, and the evidence conclusively shows, that, during

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the years 1867, 1868 and 1869, the plaintiff was employed by the defendant, as a salesman, and under an agreement that he should receive, as compensation for his services in that capacity, a share of the net profits realized by defendant from each year's business. During the year, 1867, such share was one-eighth, and amounted to \$6,700, of which the plaintiff received in cash, from time to time, during the year, \$2,500. Of the residue of his share in such net profits, being \$4,200, two-thirds, or \$2,800, were paid him in defendants' notes, at the end of the year. The other third of such residue, \$1,400, was retained by the defendant (under an understanding or agreement between the parties, with respect to which there is a conflict of evidence), and has never been paid. During the year 1868, the plaintiff's compensation was to be four-elevenths and one-half of one-eleventh ($4\frac{1}{2}$ -11ths) of such net profits, and amounted to \$15,115, of which he received in cash, from time to time during the year, \$3,383. Of the residue of his share in such net profits, being \$11,732, two thirds, or \$7,821, were paid to him at the end of the year in defendant's notes. The other third of such residue, \$3,911, was retained by the defendant, pursuant to the understanding or agreement, above referred to, or one of similar character, and has never been paid.

During the year 1869, the plaintiff's compensation was to be four-elevenths (4-11ths) of such net profits. It does not clearly appear, from the evidence, what precise amount of net profits was realized from defendant's business in 1869, and the finding of the referee, in that regard, as it appears in the printed case (whether through a typographical error, or otherwise), is obviously incorrect. It does, however, sufficiently appear, and the referee has found, that, after deducting from the plaintiff's share of such net profits the guaranteed salary to which he was entitled, and which he had drawn during the year, there remained of such

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share, a sum, whereof two-thirds was paid to him in the notes of the defendant, the other one-third being retained by defendant pursuant to the same understanding which had existed in previous years.

The referee has found that the one-third, so retained, amounted to \$1,500, adopting a mis-statement of the plaintiff to that effect which he subsequently endeavored to explain and correct.

The evidence tends to show that the net profits largely exceeded the sum specified by the referee, and that, of plaintiff's share therein, a larger sum than \$1,500 was in fact retained by defendant and never paid to him.

There is, however, little if any dispute about figures, and the error, if there be one, is in favor of the defendant. No point has been made with respect to it by either party on this appeal, and the defendant, on cross-examination, in response to the question whether he thought Mr. Churchill's statements as to the profits for each year to be correct, replied, "I presume they were. I presume he got them from our books." The controversy, so far as questions of fact are concerned, has turned mainly upon the issue made by the answer with respect to the terms and time of payment of the several sums reserved and retained by the defendant as above stated, out of the share of profits which had been agreed upon as the basis of plaintiff's compensation.

The answer alleges in substance that on or about January 1, 1867, the defendant employed the plaintiff and promised to pay him for his services, in 1868, one-eighth of the net profits during the year as follows: \$2,500 for living expenses, two-thirds of the remainder by defendant's note as alleged in the complaint, and the remaining one-third upon the maturity of said note, *should plaintiff so conduct himself as to fully*

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satisfy defendant, said last payment to be entirely optional with the defendant.

The answer also contains like allegations with respect to the employment of defendant on or about January 1 in each of the years 1868 and 1869, on similar terms; the only difference being that in 1868, the plaintiff's compensation is alleged to have been fixed at four and one-half elevenths of the net profits during that year, and \$3,500 to have been allowed him for living expenses; while in 1869 his compensation is alleged to have been fixed at four-elevenths, and \$3,500 to have been again allowed him for living expenses. In each year the final payment of "the remaining one-third" is alleged to have been conditional or optional, as previously alleged with respect to the agreement for the year 1867.

The claim of the plaintiff, as stated in the complaint, and as he testified at the trial, is that such "remaining one-third" was withheld by the defendant, at the end of each year, upon the understanding and agreement that it should be used in the business as a part of the capital and subject to its risks, until the maturity of defendant's notes (all of which were to mature January 1, 1873); but, that in case the business proved profitable, it should then be paid with interest.

It is conceded that the business did prove profitable to and beyond that date. The evidence bearing upon the controverted point is conflicting, complicated and voluminous. It appears to have been carefully examined and considered by the referee, who had all the advantages afforded by personal observation of the parties. A thorough and searching scrutiny has failed to satisfy me that his conclusions are incorrect, or that the plaintiff has failed to make out his case by a preponderance of credible evidence. I concur with the referee in the belief that the payment to plaintiff of the reserved one-third was conditional only upon the

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successful or profitable conduct of the business during the period fixed for its retention, and was not optional with the defendant, or dependent upon his satisfaction with the plaintiff, or upon his "whim" or caprice.

The only question of law discussed on the argument related to the construction and legal effect of certain receipts, purporting to be receipts in full, signed by the plaintiff and delivered by him to the defendant upon the accounting between them which was had at the close of each year.

The receipt of December 31, 1869, upon which the defendant relies as an absolute bar to the plaintiff's claim in this action, is in the following terms :

"NEW YORK, *December* 31, 1869.

"Received of Bradley & Smith, thirty-six hundred dollars in cash, and note for four thousand nine hundred and fifteen dollars, being payment in full of all accounts and claims I may have had against them, including salary, commission, bonus or any other claims whatsoever, hereby terminating all business engagements.

"It is expressly understood that this receipt is an absolute bar to any and all manner of claims excepting notes and engagement made in writing December 14, 1869, between Messrs. Bradley & Smith and myself, for salary for the year of 1870, the salary named being twenty-five hundred dollars.

"ALMANDER CHURCHILL.

"Witness, ISAAC BEALE."

Bradley & Smith was the style under which the defendant conducted his business.

It appears by the testimony of the plaintiff that this receipt, as well as others purporting to be "in full," signed by him at the close of each of the two previous years, was given at defendant's special re-

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quest for reasons personal to himself, and upon his express promise and assurance that the plaintiff's claim to the unpaid portion of his compensation should not be prejudiced thereby. The amount reserved by defendant was not then due, and would not become due for a period of three years. It does not appear that there was any controversy or difference between the parties, or that any compromise of a disputed claim was sought to be effected. The plaintiff received nothing at the time of signing the receipts unless it be the defendant's notes therein mentioned, to which he was confessedly entitled. There was, therefore, no consideration for any waiver, abandonment or release of his claim to the unpaid portion of his compensation. Moreover, the language of the receipt in terms confines its operation to claims which the plaintiff *may have had* at the time of executing it. Construing its language in the light of the surrounding circumstances, and without in any respect varying its terms, I am of opinion that it was intended to embrace only such claims and liabilities as were then presently due and enforceable, and that it did not and was not intended to relate to that part of plaintiff's compensation, which it had previously been agreed between the parties should remain as capital in defendant's business and subject to its risks for the three years next ensuing, and to which the plaintiff then had no claim and could have none until the condition should be fulfilled upon which his right would accrue.

The answer contains no averment of accord and satisfaction or of a release, and the evidence would not, as I think, sustain such defenses had they been properly pleaded. It is clear that the claim in suit has never been paid, and the receipts given by the plaintiff, although purporting to be in full and even to be an "absolute bar to all claims and demands," do not in my opinion conclude him from proof of that fact

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(Ryan v. Ward, 48 *N. Y.* 204; Bliss v. Shwarts, 65 *Id.* 444).

The judgment appealed from should be affirmed with costs.

CURTIS, Ch. J., and FREEDMAN, J., concurred.

WILLIAM PAINE, PLAINTIFF AND RESPONDENT,
v. PETER NOELKE, IMPLEADED, &C., DEFEND-
ANT AND APPELLANT.

PROMISSORY NOTE.

NEGOTIABLE AND NON-NEGOTIABLE.—MAKER AND INDORSER.—
CONSIDERATION, WHEN IMPLIED, &C.—EFFECT OF INDORSEMENT
IN BLANK BEFORE DELIVERY TO THE PAYEE, &C.—PRACTICE AND
PLEADINGS.—QUESTIONS OF, MUST BE DETERMINED ACCORDING
TO THE RULES PREVAILING IN THE COURTS OF THIS STATE.

When the action is pending therein, and in the absence of
proof to the contrary, it will be presumed by the courts of
this State, that the law of another State in regard to a sub-
ject-matter before the court, is the same as the law in this
State.

The law and decisions in regard to several kinds of promissory
notes, and the practice and pleadings when they are the
subject-matter of the action, fully discussed in the points of
counsel and the opinion of the court.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided January 7, 1878.

Appeal from order overruling demurrer.

The complaint averred : (1) That on June 1, 1874,
at Bergen, in the State of New Jersey, the defendant,
Charles D. J. Noelke, made his certain promissory

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note in writing, dated on that day, and thereby promised to pay to the plaintiff the sum of \$1,000, with interest, payable semi-annually, one year from said date.

(2) That the defendant P. Noelke indorsed said note, when said Charles D. J. Noelke delivered the same to the plaintiff.

(3) That said note at maturity was duly presented for payment to the said Charles D. J. Noelke, but was not paid, of all which due notice was given to the defendant, P. Noelke.

(4) That no part of said note has been paid, &c., &c.

The defendant, Peter Noelke, demurred on the ground that the said complaint did not state facts sufficient to constitute a cause of action against him.

The demurrer was overruled and judgment ordered in favor of the plaintiff thereon, with liberty to defendant to answer on payment of costs.

James Wiley, attorney, and *A. C. Anderson*, of counsel for appellant.—I. It is presumed that the plaintiff, in his complaint, stated his case as strongly as it could be presented or the facts would warrant. The court will not assume anything to exist which the plaintiff has not alleged in his complaint (*Roosevelt v. Dean*, 3 *Caines*, 105). The plaintiff brings his action and charges against the appellant as “indorser” only. The complaint is bad; it does not allege: (a) That there was any consideration for the instrument. (b) It does not appear to have been given for value. (c) It contains no allegation of any consideration for the appellant’s indorsement. (d) It contains no allegation that the maker received any credit or that the plaintiff, the payee, parted with any value on the strength of the indorsement. No allegation that any amount is due from the appellant by reason of or upon the in-

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strument. No copy of the note is given, no allegation of any intent by the appellant to charge himself as maker or guarantor. There is no allegation of any intent of the appellant to obtain or give credit to the maker by the indorsement. No allegation that the plaintiff took the note upon the faith of the appellant's indorsement. (e) It does not contain any averment of any agreement or understanding with the appellant, or any one, that the appellant would pay the note. (f) It does not allege any facts which go to take the case out of the ordinary presumption of law as to the intent of the appellant to be a second indorser. No instrument of contract is set forth, only the legal effect of the supposed contract of the appellant, and that is pleaded as indorsement. And for aught that appears the indorsement by the appellant may have been to accommodate the plaintiff and not the maker.

II. The complaint must allege every fact which it is necessary for the plaintiff to prove in order to recover (*Draper v. Chase Mfg. Co.*, 2 *Abb. N. C.* 79, and cases there cited; *White v. Brown*, 14 *How. Pr.* 282; *Conklin v. Gundall*, 1 *Keyes*, 228).

III. There is no presumption of a consideration; it should be alleged. If the words "value received" had been stated it might have, under some of the cases, been sufficient without any further statement of the consideration (*Prindle v. Caruthers*, 15 *N. Y.* 425). JOHNSON, J., says, at page 430, "It is necessary, therefore, that the promise should, from the complaint, appear to have been made upon consideration" (and see *Brewster v. Silence*, 8 *N. Y.* 207). The rule of pleading is stated to be "every valid contract of whatever form or nature, must be founded upon some consideration, and as a general rule every complaint in an action founded upon such contract must allege the existence of consideration sufficient to sustain the contract." There are two exceptions to this rule, viz.:

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1st, in actions upon sealed instruments, and, 2nd, those upon negotiable notes (2 *Wait's Practice*, 379). But these exceptions do not apply to a non-negotiable note; the rule in that case is as follows: "Where the instrument is not a negotiable one and it does not recite a consideration, as 'for value received' or the like, there is no presumption of consideration, and one must be proved on the trial as in the case of other contracts" (*Wait's Actions and Defences*, vol. 1, page 608), and *Edwards on Bills* states the rule to be, "but where a promissory note is not negotiable a consideration must be alleged and proved on the trial" (*Edwards on Bills and Promissory Notes*, p. 677). It is only as to bills of exchange and negotiable promissory notes, that the rule that they are *prima facie* evidence of valuable consideration applies (*Manderville v. Welch*, 5 *Wheaton*, 277). A promissory note not negotiable and not purporting on its face to be for value received, does not imply a consideration (*Bristol v. Warner*, 19 *Conn.* 16; *Richardson v. Carpenter*, 2 *Sweeny*, 360). In this last case Judge MONELL, at p. 367, says of the instrument sued upon, that it "did not import a consideration, and it was necessary for the plaintiff to aver and prove, and the referee to find that there was a sufficient consideration for the acceptance." And JONES, J., says: "It is perfectly clear that the instrument in question is not a draft nor any description of negotiable mercantile paper. It was therefore necessary to prove a consideration for the acceptance before the defendant could be held liable." This case was reversed in the court of appeals (46 *N. Y.* 660) on the facts, but the law is stated by GROVER, J., to be "the mere acceptance did not of itself create a presumption of a sufficient consideration." The case of *Lynch v. Levy*, 11 *Hun*, 145, is somewhat similar to the one under consideration, except that the note was made in the city of New

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York, and the complaint charged the defendant with indorsing the same to the plaintiff for value, and delivered to the plaintiff for value, and that the plaintiff became the owner thereof for value. At special term, DONOHUE, J., overruled the demurrer for the reason, as stated by him, that "the complaint here states that the note before its delivery to the plaintiff was for value paid to the defendant indorsed by him." At the general term the special term decision was sustained. BRADY, J., delivering the opinion says, "There can be no doubt that if in such a case as this there are allegations showing that the indorsement was made to give the maker credit with the payee, the action can be maintained," and that he (the defendant) "became bound to the plaintiff by a legal consideration for the promise to pay the amount of the note to him," and that "the allegations of consideration in the complaint with regard to the transaction are sufficient, as signaled by the words 'for value' to express the fact that a consideration moved to the defendant from the plaintiff for the indorsement." This case seems to have been decided both at special and general term upon the ground, and that solely, that the complaint contained a sufficient allegation of consideration for the indorsement. We submit that the case *Richards v. Waring*, cited by SANFORD, J., does not help the complaint. The question in that case is stated by POTTER, J. (39 *Barb.* 43), as follows: "What then is the legal effect to one who writes his name, without anything more, upon the back of a promissory note not negotiable, which is thereupon transferred to the payee named in the note, and who at the time of the delivery thereof to him parts with the full consideration mentioned in it, upon the credit of the note? That is, I think, this case fairly stated." A copy of the instrument sued upon was set out in the complaint and recited "value received," and that the consideration was given upon the

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faith of the indorsement. The case came before the court after trial, and the question was whether the person indorsing the note was entitled to notice of demand. Judge HOGBOOM, in giving the opinion of the court of appeals (1 *Keyes*, at p. 579), says: "I think a complaint setting out the circumstances under which the note was executed, the manner of the signature, and the intent of the party to become liable thereon, would show a cause of action which would entitle the plaintiff to recover." It will be found on examination that the words "value received" and the "intent of the person to become liable to pay" were considered, under the evidence and finding in the case, sufficient to entitle the plaintiff to recover. In the case now before the court, the complaint does not set forth the manner of the signature, or any intent to pay on the part of the appellant; and while we do not dispute the soundness of the maxim cited (in part) by Judge SANFORD, we claim that we are entitled to it in its entirety. *Benignæ faciendæ sunt interpretationes propter Simplicitem Laicorum ut res magis valeat quam pereat; et verba Intentioni, non e contra, debent inservire.* The theory of the maxim is, that the law should uphold, not defeat the intent (*Broom's Legal Maxims*, 414, p. 347). Whether the person who puts his name upon the note can be held as either maker or guarantor depends on the "actual intention" (Note to *Cromwell v. Hewitt*, 40 *N. Y.* 494).

IV. The note sued upon in this action was made in the State of New Jersey, and the effect of the appellant having indorsed it is to be determined by the laws of that State. The law of New Jersey is, that the making of such an indorsement as is alleged in this case, creates no implied or commercial contract whatever, and no action can be maintained thereon (*Crozier v. Chambers*, 1 *Spencer*, 257; *Chaddock v. Van Ness*, 35 *N. J.* 518; *Jaques v. McKnight*, 8 *Am. Law Journal*,

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344). It will be seen that the rule of law stated in *Richards v. Waring* (*supra*) is not the law of the State of New Jersey. This being the law of the State of New Jersey under which the appellant is to be held, the rule as settled in *Hull v. Marion*, 2 *Sup. Ct. (T. & C.)* 420; *affi'd* 59 *N. Y.* 652; *Moore v. Cross*, 19 *N. Y.* 227; *Murphy v. Merchant*, 14 *How. Pr.* 189; *Coulter v. Richmond*, 59 *N. Y.* 478; *Woodruff v. Leonard*, 1 *Hun*, 632; *Phelps v. Vischer*, 50 *N. Y.* 69; and *Bacon v. Burnham*, 37 *Id.* 616, apply to this case, and the complaint is bad in not setting out the facts required to be stated in those cases.

C. Edgar Smith, for respondent.—I. It is well settled, at least in this State, that the indorser of a non-negotiable note does not assume the legal liability of an indorser. His liability is that of guarantor or co-maker; and the payee of the note can write over the name of the indorser the substance of the contract in the body of the note. The same liability attaches to such indorser as though the name was written under the maker's in the body of the note (*Story on Prom. Notes*, § 473; *Seabury v. Hungerford*, 2 *Hill*, 84; *Hough v. Gray*, 19 *Wend.* 202). Words of guarantee in this case. Court says that indorsement in blank, indorser might repose on want of demand and notice (*Griswold v. Slocum*, 10 *Bar.* 402). Legal indorsement only on negotiable note (*Richards v. Waring*, 40 *N. Y.* 576; *Cromwell v. Hewitt*, *Id.* 491; *Hale v. Newcomb*, 7 *Hill*, 416; *Dean v. Hall*, 17 *Wend.* 214).

II. The instrument is a promissory note, though it is non-negotiable. It, therefore, imports a consideration. No consideration need be pleaded. None need be proved, in the first instance. Want of consideration may be a defense; proof of consideration would then be necessary. The complaint states that

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the instrument is a promissory note in writing. It states the fact of making and indorsing, of presentment and demand, and notice to P. Noelke. Notice was unnecessary to the latter, but its allegation is not a defect. It is a simple statement of a fact in the order of its occurrence, which may be immaterial (*Prindle v. Caruthers*, 15 *N. Y.* 425). A promissory note need not contain the words, "value received." The consideration is equally presumed without them as with them (1 *Parsons on Notes*, 193). The consideration need not be pleaded (*Goshen Turnpike Co. v. Hurtin*, 9 *Johns.* 217; *Bank of Troy v. Hopping*, 13 *Wend.* 557; *Edw. on Prom. Notes*, 169, *et seq.*).

III. In all particulars the complaint is sufficient. It states all the facts necessary to be proved, unless issue is taken by answer. The production of the note and proof of signature would be sufficient on the trial if there was no denial of consideration. Nothing need be alleged not necessary to be proved, if not denied (*Decker v. Mathews*, 12 *N. Y.* 313).

IV. The complaint does not state that the plaintiff is the holder and owner of the note, and it is well settled that this is not necessary (*Keteltas v. Myers*, 19 *N. Y.* 231).

BY THE COURT.—FREEDMAN, J.—The conflict of opinion prevailing among the courts of the different States, as to the nature of the contract implied by a blank indorsement of a promissory note before delivery to the payee, is quite extensive.

In the case of a *negotiable* note, it has been repeatedly held in this State, that a person making such an indorsement is presumed to have intended to become liable as second indorser, and that on the face of the paper, without explanation, he is to be regarded as second indorser, and as such not liable upon the note to the payee, who is supposed to be the first indorser ;

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but that such presumption may be overcome by parol proof that the indorsement was made to give the maker credit with the payee (*Coulter v. Richmond*, 59 *N. Y.* 478 ; *Smith v. Smith*, 37 *N. Y. Superior Ct.* 203).

In the case of a *non-negotiable* note, the obligation assumed by such an indorsement must, of necessity, be either that of maker or that of guarantor, and the better opinion in this State seems to be that the contract should be construed as an absolute promise to pay as a maker of the note (*Richards v. Waring*, 39 *Barb.* 42 ; affirmed 1 *Keyes*, 576).

In both cases, however, the *maker* is presumed to have made the note upon a sufficient consideration.

Thus, although bills and notes almost always contain the words "value received," and although it was formerly thought necessary to insert them, and that an instrument without them would not be a bill of exchange, it has long been settled that they are immaterial, and a consideration is equally presumed to exist without them or with them (1 *Parsons on Notes and Bills*, 193, and cases there cited).

That the same presumption exists in regard to bills and notes without words of negotiability, has been distinctly held, in *Downing v. Barkenstoos*, 3 *Caines*, 137 ; *Goshen Turnpike Co. v. Hurin*, 9 *Johns.* 217 ; *Bank of Troy v. Topping*, 13 *Wend.* 557).

The decisions in these cases rest upon the statute (1 *R. L.* 151 ; 1 *Rev. St.* 768), by which all notes in writing, made and signed by any person, and containing a promise to pay any sum of money therein mentioned, are made due and payable as therein expressed, and are to have the same effect, and are made negotiable in like manner, as inland bills of exchange, according to the custom of merchants, no matter whether the promise be to pay to the payee personally, or to his order, or to the order of the maker, or unto the bearer (§ 1). The statute further provides that the payees

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. . . of every such note payable to them or their order, . . . may maintain actions for the sums of money therein mentioned against the makers . . . of the same in like manner, as in cases of inland bills of exchange, and not otherwise (§ 4).

It was therefore distinctly laid down in *Goshen Turnpike Co. v. Hurtin*, and *Bank of Troy v. Topping*, (*supra*), that the presumption stands good until the defendant destroys it, and hence that it is not requisite that a consideration should appear upon the face of the note, or be pleaded.

It is only in the case of instruments which either do not fall within the statute, or which contain in themselves something which destroys the presumption, that a different rule applies. Thus, in *Prindle v. Caruthers* (15 *N. Y.* 425), the instrument on which the complaint was founded was not a promissory note, because it was not payable at all events. If neither Henry Caruthers nor his wife had survived till the first day of April, succeeding the making of the instrument, nothing would ever have been payable upon it. It was held necessary, therefore, that the promise should appear from the complaint to have been made upon consideration. Inasmuch, however, as the complaint set forth the instrument in full, and the same purported to have been made for value received, the court came to the conclusion that a consideration had been sufficiently alleged. So in *Spear v. Downing* (12 *Abb. Pr.* 437), the instrument sued upon was not a promissory note, payable at all events, and as its language rather negatived than supported the presumption of a legal liability, the court held that, though the instrument was pleaded in full under section 162 of the Code, the absence of any allegation showing a consideration was a fatal defect. In *Richardson v. Carpenter* (2 *Sweeny*, 360, and 46 *N. Y.* 660), the discussion took place upon the proofs, and not upon the plead-

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ings. The money was payable out of a particular fund, and therefore the instrument was not a draft within the law merchant. The remarks made in the course of that discussion by MONELL, J., in this court, and by GROVER, J., in the court of appeals, were to about the same effect as the decision in *Spear v. Downing*.

A promissory note, in order to fall within the statute, must consist of a written promise to pay a certain sum of money, at a future time, unconditionally and at all events. It must not depend on any contingency, nor be payable out of any particular fund. The note in suit comes fully up to these requirements. It is a written promise to pay to the plaintiff the sum of \$1,000 one year from the date thereof, absolutely and unconditionally.

The learned judge below was therefore correct in holding that, "inasmuch as it appears from the complaint that one of the two defendants made the note in suit in favor, but not to the order, of the plaintiff, the payee therein named, that the other defendant indorsed it, and that it was thereupon delivered to the plaintiff, and inasmuch as such an indorsement before delivery imports the liability of a maker, these averments, taken together, must be deemed equivalent to an allegation that the two defendants made the promissory note, and that both are jointly liable as makers thereof. Although not negotiable, the instrument is a promissory note, and as such imports a consideration, though none is expressed. Want of consideration is matter of defense."

The appellant insists, however, that the effect of his indorsement is to be determined according to the laws of New Jersey, where the note was made; and that, upon this point, the rule of law stated in *Richards v. Waring* (*supra*), is not the law of that State. This question, it seems to me, is not involved in the present

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appeal, which presents simply a question of pleading that must be determined according to the course of practice prevailing in the courts of this State. In the absence of proof to the contrary, it will be presumed by the courts of this State, that the law of another State, in regard to a subject-matter before the court, is the same as the law in this State (*Leavenworth v Brockway*, 2 *Hill*, 202; *Cheney v. Arnold*, 15 *N. Y.* 353; *Robinson v. Dauchy*, 3 *Barb.* 21, 29; *Hoffman v Carow*, 22 *Wend.* 324).

The order should be affirmed, with costs.

CURTIS, Ch. J., concurred.

WILLIAM H. BUCKLEY, AN INFANT, BY JOHN O'CALLAGHAN, HIS GUARDIAN, PLAINTIFF AND APPELLANT, v. THE NEW YORK AND HARLEM RAILROAD COMPANY, DEFENDANT AND RESPONDENT.

Negligence and contributory negligence are necessarily relative as to time, place, person, and surrounding circumstances. They are questions of fact, and whenever either of them is to be determined upon conflicting evidence, it should be submitted to and determined by a jury. But when the evidence is not only undisputed, but the facts are clear and convincing, and admit of but one conclusion, it is the right and duty of the court to decide, as matter of law, whether the ultimate fact involved therein, namely, the existence of negligence or contributory negligence, has or has not been sufficiently proven.

Before CURTIS, Ch. J., and SANFORD and FREEDMAN, JJ.

Decided January 7, 1878.

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Appeal from judgment dismissing the complaint.

James M. Lyddy, of counsel, for appellant.

Elliott F. Shepard, of counsel, for respondent.

BY THE COURT.—FREEDMAN, J.—Negligence, and consequently contributory negligence, is necessarily relative as to time, place, person, and surrounding circumstances.

Both are questions of fact, and whenever either of them is to be determined upon conflicting evidence, or upon a state of facts which, though undisputed, is not conclusive, for the reason that fair-minded men may well differ as to the inferences to be properly drawn therefrom, it must be submitted to the jury and determined by them.

But when the evidence is not only undisputed, but the facts are clear and convincing and admit of but one conclusion, it is not only the right, but the duty of the court to say, on a motion for a nonsuit or for the direction of a verdict in favor of defendant, that as matter of law the ultimate fact involved therein, viz., the existence of negligence or contributory negligence, has or has not been sufficiently proven.

For the rule is well settled that in every case, before the evidence is left to the jury, there is or may be a preliminary question for the court, not whether there is literally no evidence, but whether there is any upon which the jury can properly proceed to find a verdict for the party producing it and having the burden of proof.

The difficulty is not in the rule, but in the application of it. Each case must stand upon its own facts, and when this is borne in mind, and the authorities are read in the light of the peculiar facts upon which each of them rests, it will not be found difficult to reconcile the decisions of this State.

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In the case at bar the following facts appeared at the close of plaintiff's evidence, viz :

In July, 1870, the defendant owned and operated a steam railroad in Westchester county, from which, at Melrose, a side road branched off to Port Morris, which was used for carrying ore and other freight. A freight train which had come down on the main road, was switched off to the Port Morris branch to be connected with other freight cars standing on a side track ready to be taken to Port Morris. The cars moving from the main track to this side track were flat cars, and there were two brakemen upon them. While thus in motion the plaintiff climbed upon one of the said cars, and then proceeded forward. At the time of the accident he had reached the front end of the first car, which was loaded with ore, and when that car came in contact with the other cars to be incorporated into the train for Port Morris, he was thrown off and injured. He was then about nine years old, had lived in the vicinity for several years, and the premises on which he then lived with his parents were adjacent to the railroad tracks and separated from them by a fence. This fence he crossed in order to reach the cars. Upon his own showing, therefore, he was not only a trespasser, but guilty of contributory negligence.

The defendant, on the other hand, owed plaintiff no duty ; nor does it appear that the defendant either omitted to do something which the plaintiff had the right to require, or did something which he had the right to forbid. Hence no negligence was shown, and as to that, the burden of proof was on the plaintiff. From all that appears, it seems that the train was moving in the usual and ordinary way to make the connection, when plaintiff got on. It could not have moved fast, or plaintiff could not have managed to get on. But while thus in motion, the brakemen had neither the right to order him off at his peril (Hughes

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v. New York & New Haven R. R. Co., 4 *Jones & Sp.* 222), nor was it incumbent upon them to stop the train to let him get off. Indeed, there is no evidence to show that plaintiff would have got off, if he had been ordered to do so ; nor does it appear that the train could have been stopped in time to prevent plaintiff's injury, or that the concussion was unnecessarily violent.

In *Fleming v. Brooklyn City R. R. Co.* (1 *Abb. N. C.* 433), the plaintiff, a newsboy, had a license to pass on and off the car for the purpose of selling papers to the passengers, and, having been injured, he sought to recover on the theory that the driver permitted him to pass out and off, by way of the front platform, without stopping or slackening the speed of the car, and without directing him to pass out by way of the rear platform. But the dismissal of the complaint was sustained on the ground that he was not a passenger ; that the company could not, in any sense, be deemed to be the guardian, for the time being, of children of tender years, who are permitted by their parents or guardians upon the cars for the purpose of selling papers, and that no duty arises in such a case to restrain them from exposing themselves to danger.

The case was properly disposed of, and the judgment should be affirmed with costs.

CURTIS, Ch. J., and SANFORD, J., concurred.

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WILLIAM A. BUTLER, PLAINTIFF AND RESPOND-
ENT, v. WILLIAM J. H. BALLARD, WILLIAM
HALLEY, AND LUCIUS MOORE, DEFENDANTS
AND APPELLANTS.

I. PARTNERSHIP.

1. ACCOUNTING BETWEEN PARTNERS.

(a) SOME HAVING OVERDRAWN AND OTHERS UNDER-
DRAWN.

(1) As to each partner who has underdrawn, all the others are liable to him for their respective portions of the amount of the underdraft ; and as to each partner who has overdrawn, he is liable to all the others for their respective portions of such overdraft.

(a) *Insolvency of overdrawing partners, effect of.*

1. Does not affect the application of above principles.

EXAMPLE OF ACCOUNTING ON ABOVE PRINCIPLES.

1. Ballard, Butler, Halley, and Moore, were in partnership, their respective interests being 40, 22, 20, and 18, per cent.

Ballard overdrew.....	\$15,243.08	
Halley overdrew.....	11,966.51	
		<u>\$27,209.59</u>

Moore drew \$17,922.82 less than his capital and his share of the profits; that is, underdrew by.....\$17,922.82

Butler drew \$9,286.77 less than his capital and his share of the profits; that is underdrew by..... 9,286.77

On the accounting:		<u>\$27,209.59</u>
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Butler was charged in favor of Moore, with 22% of \$17,922.82..... \$3,942.84

Moore was charged in favor of Butler, with 18% of \$9,286.77..... 1,671.62

Balance in favor of Moore against Butler	\$2,271.22
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Ballard was charged in favor of Moore, with 40% of \$17,922.82..... \$7,169.12

Also with 18% of \$15,243.08..... 2,743.74

Balance in favor of Moore against Ballard	9,912.86
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Halley was charged in favor of Moore,	
with 20% of \$17,922.82... ..	\$3,584.56
Also with 18% of \$11,966.51... ..	2,153.98
	<hr/>
Balance in favor of Moore against Halley	5,738.54
	<hr/>
Amount of Moore's underdraft... ..	\$17,922.62
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Moore was charged in favor of Butler, with 18%	
of \$9,286.77 (credited above).	
Ballard was charged in favor of Butler,	
with 40% of \$9,286.77... ..	\$3,714.70
Also with 22% of \$15,243.08... ..	3,358.48
	<hr/>
Balance in favor of Butler against Ballard	\$7,068.18
Halley was charged in favor of Butler,	
with 20% of \$9,286.77... ..	\$1,857.35
Also with 22% of \$11,966.51... ..	2,632.63
	<hr/>
Balance in favor of Butler against Halley	4,489.98
	<hr/>
	\$11,558.16
This includes the balance of the sum above	
charged against Butler in favor of Moore, after	
crediting above sum charged against Moore in	
favor of Butler... ..	2,271.22
	<hr/>
Amount of Butler's underdraft... ..	\$9,286.94
	<hr/>
Halley was charged in favor of Ballard,	
with 40% of \$11,966.51... ..	\$4,786.61
Ballard was charged in favor of Halley,	
with 20% of \$15,243.08... ..	3,048.62
	<hr/>
Balance in favor of Ballard against Halley....	\$1,737.99
Judgment was given:	
In favor of Moore against Butler, for... ..	\$2,271.22
In favor of Moore against Ballard, for... ..	9,912.86
In favor of Moore against Halley, for... ..	5,738.54
In favor of Butler against Ballard, for... ..	7,068.18
In favor of Butler against Halley, for	4,489.98
In favor of Ballard against Halley, for... ..	1,737.99

HELD,

Correct.

Before CURTIS, Ch. J., VAN VORST and FREEDMAN, JJ.

Decided January 7, 1878.

Statement of the Case.

Appeal from order confirming referee's report and overruling exceptions.

This action is brought for an accounting between partners.

The parties to the action were members of a limited copartnership under the name of Ballard, Halley & Co., from January, 1869, to December 31, 1874, when the same expired by limitation.

The plaintiff and the defendants, 'Ballard and Halley were the *general* partners, and the defendant Moore, the *special* partner.

The plaintiff contributed \$15,000, the defendant Moore \$25,000; the defendants Ballard and Halley contributed nothing. The profits and loses were to be divided between the partners as follows: To Ballard forty per cent., to Halley twenty per cent., to Butler twenty-two per cent., to Moore eighteen per cent.

The general partners were each permitted to draw from the profits stipulated sums for living expenses.

The business was a profitable one, but after payment of all the firm debts, it appeared that by reason of overdrafts and bad debts, all the general partners had more than anticipated their share in the profits, and that there did not remain sufficient funds to repay the capital contributed, and all of the partners their shares in the assets.

On defendant's motion it was referred to Henry J. Scudder, Esq., referee, to take and state the account between the parties.

The referee made his report, whereby, after finding and reporting the sums due to Butler and Moore, and by Ballard and Halley, he found and reported as follows:

"*First*, the sums due to Butler and Moore must be paid by all the partners in the percentage proportions of their interests.

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“*Second.*—The sums due by Ballard and Halley must be paid to all the parties in like proportions, and thus each partner will have in the form of a claim upon one or all the others as the result may determine, just his share of the whole sum.

“Thus there is due to Moore \$17,922.82.

“Of this Ballard must pay 40 per cent. or \$7,169.12
 Butler must pay 22 per cent. or 3,942.84 (*a*)
 Halley must pay 20 per cent. or 3,584.56
 Moore pays to himself or retains 18 per cent. (*d*)

“There is due to Butler \$9,286.77

“Of this Ballard must pay 40 per cent. \$3,714.70
 Halley must pay 20 per cent. 1,857.35
 Moore must pay 18 per cent. 1,671.62 (*e*)
 Butler pays to himself or retains 22 per cent. (*b*)

“Ballard must then distribute the sum he has drawn in excess, viz : \$15,243.08, and this will be distributed as follows :

To Butler 22 per cent. = \$3,353.48
 To Halley 20 per cent. = 3,048.62
 To Moore 18 per cent. = 2,743.74
 And he retains 40 per cent. as his own share or proportion.

“Halley must then distribute the sum he has in excess, viz : \$11,966.51, and of this

Ballard takes 40 per cent. = 4,786.60
 Butler takes 22 per cent. = 2,632.63
 Moore takes 18 per cent. = 2,153.98
 And Halley retains 20 per cent. as his own.

“The account will then stand :

Butler will owe to Moore \$3,942.84
 Moore will owe to Butler 1,671.62

Deducting the latter we have \$2,271.22
 for which, with interest from January 1, 1875, Moore is entitled to judgment against Butler.

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“Ballard will owe to Butler the sum
of \$3,714.70
3,353.48 (c)
\$7,068.18
to Moore the two sums of . \$7,169.12
2,743.74 (f)
\$9,912.86
to Halley \$3,048.62
“Halley will owe to Butler the two
sums : \$1,857.35
2,632.63 (c)
\$4,489.98
to Moore the two sums of . \$3,584.56
2,153.98 (f)
\$5,738.54
to Ballard . . . \$4,786.61
As Ballard owes Halley 3,048.62
there will be due
by deduction \$1,737.99
from Halley to Ballard, for which, with interest from
January 1, 1875, the latter should have judgment
against the former. Moore is entitled to judgment
against Ballard for \$9,912.86, with interest from January
1, 1875, and to judgment against Halley for \$5,738.54,
with interest from January 1, 1875.
“Butler is entitled to judgment against Ballard for
\$7,068.18, with interest from January 1, 1875, and to
judgment against Halley for \$4,489.98, with interest
from January 1, 1875.
“The cash on hand, and all moneys hereafter real-
ized, should be divided according to the proportions
herein recognized ; and as received, should be paid by
the receiver to the creditor parties.” *

* Provision for the repayment of item (a), and the payment of

Appellant's points.

The report of the referee was confirmed at special term, and defendant's exceptions thereto overruled.

From the order entered thereon, defendants appeal.

Messrs. Childs & Hull, attorneys and of counsel, for appellant Moore, among other things, urged:—I. As Ballard and Halley are insolvent and cannot pay, the amount of their indebtedness becomes a loss to be borne by the two creditor partners, in the same proportion as the profits and losses have been divided between them heretofore, viz: as 22 is to 18. The relative proportions of Butler and Moore, the creditor partners, to each other, by the partnership agreement, was as 22—40ths or 55 per cent. to Butler, is to 18—40ths or 45 per cent. to Moore. The relative proportions of Butler & Moore to each other, being 55 per cent. to Butler, and 45 per cent. to Moore, or as 22 is to 18, Butler will owe Moore 45 per cent. of his account, and Moore will owe Butler 55 per cent. of his account. The difference between these two sums will adjust the accounts of Butler and Moore with each other, thus:

item (b), is made by items (c); and provision for the repayment of item (d), and payment of item (e), is made by items (f).

The result is that Ballard and Halley are made ultimately liable for the amounts due Butler and Moore, in the proper proportions according to their respective interests; while Halley is made liable to Ballard for the excess of his overdraft over that of Ballard.

It will be seen that by the principle adopted on the accounting, with above result, Butler is obliged to pay to Moore, out of the sum he had drawn (although he had not drawn as much as he was entitled to), \$2,271.22; and to accept, in place of this sum, a claim against Ballard and Halley.

The court held, that even if Ballard and Halley were, as alleged, insolvent, the principle adopted was the correct one.

The effect, it will be observed, is to produce equality between Butler and Moore, according to their respective interests, both as to the amounts actually received by them in cash on account of their respective shares, and as to the amounts which must rest as to each in the shape of claims against Ballard and Halley.

Respondent's points.

45 per cent. of Butler's acc't, \$9,286.78, is \$4,179.05

55 " " Moore's " 17,922.81, is 9,857.54

Difference due Moore, by Butler, \$5,678.49

Weeks & Forster, attorneys, and *George H. Forster*, of counsel, for respondent, among other things, urged:—I. The principles which regulated the reference, are briefly stated in *Newdecker v. Kohlburg* (3 *Daly*, 410). In taking or stating the final accounts of a copartnership, it is to be ascertained what each partner is entitled to charge in account with his copartners, each being entitled as against the other to everything he has advanced or brought in as a partnership transaction, and also what the other has not brought in, or has taken out more than he ought (cites *West v. Skip*, 1 *Ves. Sen.* 239), and then to apportion between them the profits to be divided, or losses to be made good, and ascertain what, if anything, any partner should pay to the other in order that all cross claims may be settled (cites *Lind. on Part.* 828). This accounting is to be governed, however, as between the partners, by the special provisions of the copartnership agreement, and the right to a return of capital invested by each partner, is only to be destroyed by express stipulation to the contrary (3 *Daly*, 410, 414).

II. Had the method suggested by the plaintiff's exceptions been adopted, the result would have been more favorable to the plaintiff.

III. Defendants cannot complain of the method adopted by the referee, and the order and judgment appealed from should be affirmed, with costs.

BY THE COURT.—FREEDMAN, J.—It is conceded that the referee has correctly found the amounts withdrawn by, and the balance due to and by, the several parties to the co-partnership. It therefore appears without contradiction that there was due from all sources:

Respondent's points.

To Butler	\$9,286.77
To Moore	17,922.82
Total	<u>\$27,209.59</u>

On the other hand Ballard and Halley had largely overdrawn their respective accounts, and there was due

From Ballard	\$15,243.08
From Halley	11,966.51
Total	<u>\$27,209.59</u>

—or exactly the aggregate amount to which Butler and Moore were entitled.

The cross claims arising from this state of facts between the partners themselves, the referee determined upon the theory, (1) that the sums due to Butler and Moore should be paid by *all* the partners in the percentage proportions of their interests; and (2) that the sums due by Ballard and Halley should be paid to *all* the partners in like proportions, and that thus each partner should have, in the form of a claim upon one or all the others, just his share of the whole sum.

It is also conceded that if this theory is applicable the computations made upon it are not open to objection.

In my judgment the theory adopted and acted upon was the correct one. It is in accordance with the principles laid down in *Neudecker v. Kohlberg* (3 *Daly*, 407), and the provisions of the articles of copartnership in this case.

The alleged insolvency of Ballard and Halley does not call for a different apportionment. For even if such insolvency existed, the amounts overdrawn and due by them cannot, as between the partners themselves, be treated as losses within the true intent and meaning of that word as used in the articles of copartnership. Moreover, the said articles expressly provided “that at the termination of the partnership, either by death or otherwise, or its own limitations after the

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payment of all the indebtedness of said partnership, there shall first be paid from the assets of said partnership, to the said parties of the third and fourth parts (Butler and Moore), the capital contributed by the said parties of the third and fourth parts, to the common stock . . . with interest, . . . and, secondly, that the respective interests of all the parties hereto, in the profits of said partnership, shall be adjusted and paid according to their respective shares of per centum in the same."

The claim, therefore, which has been advanced by the appellants, that the amounts overdrawn by Ballard and Halley constituted losses to be borne by the *two creditor partners* in the proportion that the profits and losses were divided *between them*, is quite untenable.

The order should be affirmed, with costs.

CURTIS, Ch. J., and VAN VORST, J., concurred.

JOHN ADOLPH, PLAINTIFF AND RESPONDENT, v.
THE CENTRAL PARK, NORTH AND EAST
RIVER RAILROAD COMPANY, DEFENDANT
AND APPELLANT.

Head-note to General Term decision.

I. STREET RAILROADS.

1. VEHICLES DRIVING ALONG THE TRACK.

1. DRIVER OF CAR APPROACHING VEHICLE IN THE
REAR, AND DRIVER OF VEHICLE, RELATIVE RIGHTS
AND DUTIES OF.

(a) DRIVER OF VEHICLE.

1. *Rights of.* Has equal rights with the cars to travel on the track. Neither has any superiority of right in this respect.

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2. *Duty of.*

1. Not to unnecessarily obstruct the cars in their due, regular and orderly passage over the track.
2. As soon as he becomes aware that a car is approaching him from behind, he must use reasonable diligence, prudence and speed, to get off the track before the car reaches him. *If he omits so to do, and the car comes in collision with him, he is chargeable with contributory negligence.*
3. To pay such attention to the approach of cars in the rear, as a man of ordinary prudence, care and intelligence, would, under similar circumstances, give, consistent with the other duties of looking ahead, and on both sides. *He is not specifically called on to look out for vehicles approaching from behind ; that is, to turn round and keep a lookout behind at all times.*

(b) DRIVER OF CAR.

1. *Rights of.* To pass without unnecessary obstruction over the track, in due, regular and ordinary course.
2. *Duty of.* To keep such a distance behind a vehicle in front, and to keep his horses and car under such control, as that they will not collide with the vehicle when it attempts to get off the track.

2. CONTRIBUTORY NEGLIGENCE.

1. *Driver of vehicle, what does not constitute on his part.*

- (a) UNNECESSARILY ON THE TRACK. The fact that a vehicle is being unnecessarily driven on the track, does not of itself constitute contributory negligence, nor is it a fact to be taken into consideration in determining the question of contributory negligence ; nor does it require the driver of the vehicle to use greater care and diligence and keep a better lookout than he would otherwise be bound to.

Before SANFORD and FREEDMAN, JJ.

Decided January 7, 1878.

Head-note to Judge SEDGWICK's charge.

I. EVIDENCE.

1. CARE, DILIGENCE AND PRUDENCE.

1. STANDARD OF. It is that which, as experience teaches us, men of ordinary caution and prudence would exercise under similar circumstances.

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(a) *Weighing a man's faculties.* The jury are not to weigh a man's faculties and see how smart he was, how bright, how attentive, and say whether or not, as a matter of fact, he was as prudent as he could be by nature.

2. CAPACITY FOR OBSERVATION.

1. ELEMENTS OF. Cultivation of the mind, and quickness of the faculties and of sight, are.

(a) In judging of the evidence of several witnesses who have testified to the same occurrence, *their capacity to observe is to be thus tested.*

3. WITNESSES.

1. PARTS OF THEIR TESTIMONY MAY BE TAKEN.

(a) The jury may take parts of the testimony of the witnesses in connection with all the probabilities of the case, and thus determine the fact.

1. It is *not necessary* that they should take the whole of any one witness's statement.

Charge delivered November 23, 1876.

Appeal by defendant from judgment entered upon verdict of jury, and from order denying motion for new trial.

The plaintiff in this case was driving a loaded wagon along the track of defendant's railroad. One of defendant's cars approached behind him. Plaintiff turned his horse to drive off the track. Before the wagon had got entirely clear of the track, the car struck its tail and upset it. Plaintiff's wagon and horse, and himself were injured. To recover for these injuries the action is brought.

There have been two trials of the cause.

Upon the first trial a verdict was directed for the defendant upon motion, on the ground that no negligence had been shown on the part of defendant, and that the plaintiff had been guilty of contributory negligence, judgment was suspended, and the exceptions ordered to be heard at the general term in the first in-

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stance. The decision of the trial term was affirmed (33 *Superior Ct.* 186).

From the judgment thereupon entered, the plaintiff appealed to the court of appeals, and the case came up for argument before the commission of appeals, which by a vote of three to two reversed the decision of this court, and held that there was a question for the jury (65 *N. Y.* 554).

The second trial was had before Judge SEDGWICK and a jury. The judge submitted the cause to the jury.

The charge of the judge, with the above statement, sufficiently indicates the nature of the case, the evidence, and the facts.

The charge, with the exception of two passages which are not material here, was as follows :

GENTLEMEN :—The most general rule of law that is applicable to this case is that the driver of the wagon, the plaintiff, and the driver of the car, were each of them bound to use the prudence of a man of ordinary caution and intelligence. In their conduct they must come up to that standard. Neither is held to extraordinary care, but to the care that is given by men of ordinary caution and ordinary intelligence, under the circumstances that you shall find to exist. Of course it is impossible that the law should make any other standard than that. You do not try to weigh a man's faculties and see how smart he was, how bright, how attentive, and say whether or not as a matter of fact he was as prudent as he could be by nature. It would be impossible for a jury to do that, or a court, if they attempted it. They can only compare a man's actions with ordinary prudence and care, as the jury know it from their own experience. And that rule of law you will keep in mind, of course, in passing upon the facts of the case, in saying which party in this controversy is wrong.

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The next rule of law which it is required that the courts shall turn the attention of the jury to, is that the plaintiff must make out a case. If he does not establish by a preponderance of evidence what it is necessary for him to prove in making out such a case as this, then the jury cannot say that he has made out a case, and must find for the other party. . . . I have omitted two witnesses for plaintiff—the boy and the officer, Mr. Greubelstein. As to the boy, it is right that you should bear in mind that at the time of the transaction he was eleven years of age. If he was then what he is now, he was, undoubtedly, a smart, clear-headed, honest young fellow, but his youth affected his capacity to observe many facts at the same time. That is, the best cultivated minds, and having the quickest sight and the quickest faculties, can see several things at once, and weigh them at once. The more immature or the less cultivated they are the more the attention is fixed upon a part of a transaction. I do not mean, in saying that, that you shall disregard the boy's testimony, or to weaken its effect in any way; I merely call your attention to that fact, which is a fact which you must consider in weighing his testimony.

Then in regard to Mr. Greublestein's testimony—you have had him before you. . . .

You will reconcile the testimony together. It is not necessary for you to take the whole of any one witness's statement. You may take parts, and take all the probabilities of the case, and all these considerations that I have alluded to, and say what, as a matter of fact, occurred at that time, putting these facts together in their natural and probable order. And in judging, in the way that I have endeavored to describe, you will get considerable aid in judging of the probabilities of the case from such undoubted facts as there may be in the evidence.

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I think this fact is clear in the beginning, but you must say whether it is or not. Groeneman, the boy, could not say when Adolph, the plaintiff, came on Avenue A. The witnesses for the defendant, three or four of them—four, I think—the driver, the conductor and the two Dempseys—say that he came on the avenue and on the track of the defendant, and was before the car of the defendant between Fifteenth and Sixteenth streets. Now, Mr. Adolph does not say when he came on, and does not explain that, and therefore, unless you disregard the whole of the testimony, and do not take into consideration those things that I have said as to the absence of any testimony on the part of the plaintiff, then I think you will come to the conclusion that the loaded wagon which Mr. Adolph, the plaintiff, was driving, was on the railroad between Fifteenth and Sixteenth streets, and the car was behind it. Now, if that be the case, gentlemen, you will apply your minds to what would be probably done under the circumstances, and then say as to whether or not the evidence of the witnesses for this defendant is true—that from the point at which, between Fifteenth and Sixteenth streets, the plaintiff did come on, they were calling to him and whistling, etc. Mr. Dempsey thinks they called once before the final accident. Mr. Donovan says it was several times. The driver's testimony on that point you have heard, and the other Dempsey's testimony. Now say whether you think he was called to several times.

A JUROR: I would like to ask a question. Does it appear in the evidence where the car was when he saw them come on the street? The car may have been back three or four blocks.

Mr. VANDERPOEL: Half a block.

THE COURT: That is a very material consideration, but whether it was or not, you take all the facts together, that it was within that distance that it required

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the hallooing, if you believe that was done, and also the car to vary its speed according to the rate of the wagon ahead of it ; consider the facts as they are.

Now, if those facts are established, what was the duty of the plaintiff in respect of it? He had as good a right on that track as the defendant's car; there was no superiority of right; he had a right to travel on the track. But the defendant's car could move but in one direction—on the rails—and therefore the law says that it is the duty of a wagon situated as the plaintiff's wagon was, to get out of the way of a car immediately behind it, using reasonable care for that purpose, and all the speed that might be reasonably required under the circumstances; and in addition, as it was the car driver's duty to observe the wagon ahead of the car, on the other hand it was the duty of the driver of the wagon, the plaintiff himself, knowing that this was the condition of things, knowing how this track was occupied, knowing that cars were coming along, to give that attention to the situation of things behind him that might be called for from a man of ordinary intelligence, while at the same time he was doing his other duty in looking ahead of him, and on both sides. That is, it was not his positive duty to keep a lookout behind at all times, because it was his duty to look ahead and on each side; but he was to give some attention to it, and such attention as you, as jurymen, think should be reasonably given under those circumstances. Then you will say whether or not, if giving that reasonable attention, he could have known that this car was following behind him, and was intending to assert its rights to pass along the track, and could have gone off on the west side, the east side by the conceded testimony being obstructed. If he did not give such attention, then to that extent the plaintiff would be guilty of contributory negligence, if that negligence led to the accident.

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These are considerations immediately prior to the time of the accident happening. Now the accident is about to happen and there is a conflict of testimony; I think the broadest conflict of testimony that there is. Mr. Groeneman says that the car was thirty or forty feet off when he heard the car-driver halloo, or first noticed the car. The plaintiff says it was fifty feet off. Mr. Greubelstein's testimony on that point I am uncertain as to, and the jury must find what it was.

On the other hand, the defendant's witnesses say that the car was much nearer the wagon than that; they say it was within five or six feet of it immediately before the accident happened. You must determine the distance and say what it was. Now the plaintiff being obliged to prove his case under those circumstances, if this be the fact that the car, when he first saw it, was at such a distance from him that by using reasonable diligence, prudence and speed, he could have gotten off the track before the car came upon him, he is guilty of the kind of negligence which deprives him of his action, and that ought to be the law. Two parties together produce an accident; nobody, no court, no jury could tell which did the most of it and which was most guilty. One does it as much as the other. On the other hand, if he used that kind of caution that I have described, and could not get off the track any more quickly than he did, could not avoid the effect of the onward movement of the car, then he is not guilty of contributory negligence, and on that point you will decide in his favor.

The next thing will be, was the defendant, under those circumstances, guilty of negligence? Well, now, gentlemen, the defendant is called upon to use the same kind of caution as the plaintiff is called upon to use. Now recollect all the circumstances; where the car was behind the wagon, how it was following on,

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what a reasonable man would be led to think after following a man a block or half a block as to his not getting off at any particular time; that is, whether having shown that he did not hear the car-driver, or did not attend to the car-driver, if he chose to keep on the track, what reason there would be for a car-driver, under those circumstances, to believe that suddenly, without any notice, he meant to get off the track.

Look at that circumstance. Look at the circumstances on the other hand under the rule of law that I have given to you impliedly, that the car-driver was bound to keep such a distance behind the wagon, and to keep his horses and his car under such control that they would not run against the wagon when it did get off. Look, if you can find from the testimony of the case, at what speed the plaintiff was turning off; whether or not if he had continued that speed there would have been a collision. Because one of the positions of the defendant is—and one of the witnesses swears to it—and it is more or less a matter of opinion, and you must be yourselves the judges of that—that if this wagon had continued at the rate at which it began to go it would have passed beyond the track, and there would have been no collision.

The witnesses for the defendant at the same time say that there was a jerk of the reins which made the horse go more slowly without bringing the wagon to a stop. Look at all those things and say whether or not the defendant, the car-driver, was guilty of negligence in judging as to the probability of this car's striking the wagon tail, and if you are satisfied from the evidence that the defendant was negligent, you will, having found before that the plaintiff was free from negligence under the circumstances of the case, find a verdict for the plaintiff, and you will then assess his damages, which will be a full compensation for the sufferings, as he has given in evidence, from his injuries that

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have happened, and for all the suffering that will happen during the time that the injuries are likely to continue—you will give him a compensation for the injury to his horse and for the injury to his wagon.

On the other hand, if the plaintiff has left the case in such doubt that you are not able to say that the preponderance of evidence is in his favor, why then you must find for the defendant; or, if you find that the plaintiff is guilty in any degree of contributory negligence, you must find for defendant. And again, if you find that the defendant was without fault you must find for him.

Defendant's counsel submitted various requests to charge.

Only those which the judge refused will be adverted to. Those refused were numbered 5, 6, 7, 8, 9, 10, 11, and 12. They were:

V. "That the plaintiff, under the circumstances, was bound to exercise care and diligence, and keep a lookout for a car approaching from the rear."

I refuse to charge this.

To the refusal of the court to charge said request, defendant, by its counsel, then and there duly excepted.

But I do charge he was bound to exercise care and diligence, and he was bound to pay such attention as his other duties in front of him would permit, but the approach of a car in the rear he was not specifically called upon to look out for; that is, to turn around, but he must give some attention to that. That, in going along any railroad street, is as important as anything else; he knows that the cars come along, and they have, as I have explained, a right to pass him,—that is, a right to demand that he should get out of the way.

X. "If the plaintiff saw the approaching car in

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time to get off the track and did not do so, then he he was guilty of negligence and cannot recover.”

I prefer to refuse that, because I will modify it. If he saw it, and then under all the circumstances of the case, by using ordinary skill in the management of his horse, the same kind of skill that the driver of the car was called upon to use with his horse, and under the circumstances of the case, if he could have got off, why, then he was bound to do it; and if his not getting off led to the accident, then he cannot recover.

To the refusal of the court to charge said tenth request, and to the charge of the court in respect thereto, and modifying the same, defendant, by its counsel, then and there duly excepted.

XI. “It is undisputed that the plaintiff drove upon the track of the defendant for upwards of two blocks, and it was his duty, under the circumstances, to have kept a lookout behind him for an approaching car, and if he did not do so, then he was guilty of negligence and he cannot recover.”

I refuse to charge you, gentlemen, in those terms.

To which refusal of the court to charge said eleventh request, defendants, by its counsel, then and there duly excepted.

I say I think the great weight of the evidence in this case is, that he was before the car from a point between Fifteenth street and Sixteenth street, to the point between Seventeenth and Eighteenth streets, where the accident happened. That is a question, however, for you, although that is my opinion; and then, instead of being his duty to keep a lookout, I hold that he was called upon to attend to it in the way I have several times described to you.

A JUROR: I would like to ask a question. My mind is far from being clear upon this point; suppose this plaintiff had stood on the track in front of that

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car, and they knew that he knew that he stood there, and they had come up and hit him as they did.

THE COURT: Now, gentlemen, there is a disadvantage in taking supposititious cases; but if it is any illustration, let me say, that if, under those circumstance, the car coming up behind should run into the wagon, it would be guilty of negligence, which, so far as that is concerned, would give the man a right of action, but the man would lose his right of action for standing on the track, as being guilty of contributory negligence; in such a case as this they would be guilty of negligence, and the party injured could not recover from the other.

The defendant also requested the court to charge as follows:

VI. "Upon the evidence in this case it is undisputed that the plaintiff was unnecessarily upon the track of defendant at the time of the collision, there being nothing to prevent his driving upon one side of the track."

The court refused so to charge, to which refusal the defendant, by its counsel, then and there duly excepted.

The defendant also requested the court to charge as follows:

VII. "That this is a fact to be borne in mind by the jury in determining whether the plaintiff was free from negligence."

The court refused so to charge, to which refusal the defendant, by its counsel, then and there duly excepted.

The defendant also requested the court to charge as follows:

VIII. "From the fact of the plaintiff's having driven his wagon on the railroad track, in front of the car, and continuing thereon without any apparent necessity, he was bound to use greater care and dili-

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gence, and keep a better lookout, than he would have been if he had not been on the track, that he might avoid the collision."

The court refused so to charge, to which refusal the defendant, by its counsel, then and there duly excepted.

The defendant also requested the court to charge as follows :

IX. "The defendant was entitled to the unrestricted use of its rails, for the progress of its cars, and the plaintiff, being unnecessarily on the track, was bound to exercise care, to see that an approaching car was not impeded, and if by reason of the plaintiff's being there, the collision ensued, the plaintiff cannot recover even though the conductor and driver of the car were negligent."

The court refused so to charge, to which refusal the defendant, by its counsel, then and there duly excepted.

The defendant also requested the court to charge as follows :

XII. "The verdict should be for the defendant."

The court refused so to charge, to which refusal the defendant, by its counsel, then and there duly excepted.

The jury thereupon retired, and afterward returned a verdict for \$5,000.

Defendant's counsel moved for a new trial upon the minutes, which was denied, and an order was entered to that effect.

Judgment was thereafter entered on the verdict; from which, as well as the order denying the motion for a new trial, the present appeal was taken.

Vanderpoel, Green & Cuming, attorneys, and *Almon Goodwin*, and *A. J. Vanderpoel*, of counsel, for appellant, urged:—I. The court below should have

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granted the motion for the dismissal of the complaint, or have directed a verdict for the defendant. Failing in this, it should have granted the motion for a new trial, which was denied. We desire to call the attention of the court to the fact that plaintiff now admits his hearing the shout of the driver, which introduces a new element in the case, and also to the overwhelming preponderance of evidence that the plaintiff *jerked* his horse as he turned from the track and by his unskillfulness produced, or at least, contributed to the accident. All that the majority of the commission of appeals decided upon the facts before them was that there was *some* evidence to go before the jury as to whether the plaintiff's negligence contributed to the injury. The duty of the court still remained, after submitting the case to the jury, to set aside their verdict when it was clearly against the weight of evidence (*Hollacher v. O'Brien*, 5 *Hun*, 277 ; *Adsit v. Wilson*, 7 *How. Pr.* 64 ; *Heritage v. Hail*, 33 *Barb.* 275 ; *Cothran v. Collins*, 29 *How. Pr.* 155). If the court shall be of the opinion that, under the decision of the commission of appeals, the case was one to go to the jury, we ask its attention to the errors in the manner of submitting it.

II. The court erred in refusing to charge the sixth, seventh, eighth, ninth, tenth, and eleventh, requests of defendants. We submit that the charge did not cover the ground fully and fairly and the exception and the refusal to charge as requested cover the whole ground. *First.* The court erred in refusing to charge the fifth request (*Baker v. Savage*, 45 *N. Y.* 191 ; *Ernst v. Hudson River R. R. Co.*, 24 *How.* 97 ; *Nicholson v. Erie R. R. Co.*, 41 *N. Y.* 542 ; *Baxter v. Troy and Boston Co.*, *Id.* 502 ; *Hart v. Central Co. of N. J.*, 42 *Id.* 472 ; *Griffen v. N. Y. C. R. R. Co.*, 40 *Id.* 34 ; *Wilcox v. Rome, &c. R. R. Co.*, 39 *Id.* 358 ; *Wild v. Hudson River R. R. Co.*, 29 *Id.* 315 ; *Bunn v. Delaware, &c. R. R. Co.*,

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6 *Hun*, 303; *Wild v. Hudson River R. R. Co.*, 24 *N. Y.* 430, 442; *Warner v. N. Y. Central R. R. Co.*, 44 *Id.* 465, 470; *Meyer v. Clark*, 45 *Id.* 285, 289). *Third.* The refusal to charge the eighth request was error (*Wilbrand v. Eighth Ave. R. R. Co.*, 3 *Bosw.* 314; *Barker v. Savage*, 45 *N. Y.* 191, 194; *Suydam v. Grand St., &c. R. R. Co.*, 41 *Barb.* 377; *Whittaker v. Eighth Ave. R. R. Co.*, 51 *N. Y.* 295, 299. See also *Hegan v. Eighth Ave. R. R. Co.*, 15 *Id.* 382; *Belton v. Baxter*, 14 *Abb. Pr.* [*N. S.*] 404). The rule applicable to a person driving on the wrong side of the road is closely analogous. Although a person is not bound to confine himself to his proper side of the road, yet if he does not, he is bound to use a greater degree of caution than if he kept the proper side (*Pluckwell v. Wilson*, 5 *C. & P.* 375; 24 *E. C. L. R.*; *Simonson v. Steltenerft*, 1 *Edmonds*, 194). *Fourth.* The court also erred in refusing to charge the ninth request of the defendant. The request was in accordance with the rule laid down in *Hegan v. Eighth Ave. R. R. Co.*, 15 *N. Y.* 380, 383; and *Willbrand v. Eighth Ave. R. R. Co.*, 3 *Bosw.* 314. *Fifth.* The court also erred in refusing to charge the defendant's tenth request (*Wild v. Hudson River R. R. Co.*, 24 *N. Y.* 430, 442; *Warner v. N. Y. Central R. R. Co.*, 44 *Id.* 465, 470; *Meyer v. Clark*, 45 *Id.* 285, 289).

III. The court below, as we have shown, did not submit the question of contributory negligence to the jury in such a manner as to impress upon them properly the rule of law and the bearing of the facts in the case upon it. The jury overlooked, or entirely disregarded other parts of the charge, so that their verdict was against the charge as actually given. What is the duty of an appellate court upon such a state of facts has been very clearly laid down (*Sheldon v. Hudson R. R. Co.*, 29 *Barb.* 226, 229; *Haring v. New York & Erie R. R. Co.*, 13 *Id.* 380; *Suydam v. Grand St.*,

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&c. R. R. Co., 41 *Id.* 380 ; *Macy v. Wheeler*, 30 *N. Y.* 231, 237).

M. L. Townsend, attorney, and of counsel for respondent, among other things, urged :—I. The plaintiff had the right to be upon the track where he was, and to drive his wagon upon or across it, and it was as much the duty of the defendant to keep its car off the plaintiff's wagon, as it was that of the plaintiff to escape being run over (Opinion of EARL, C. ; *Hegan v. Eighth Avenue R. R. Co.*, 15 *N. Y.* 380).

II. It being plaintiff's duty to turn his horse and wagon off the track when he saw or heard the car approaching, he had a right so to do, and to sufficient time for that purpose ; and it was the duty of the driver of the car to give him a reasonable opportunity to do so (opinion of EARL, C.) ; and in turning off the track the plaintiff was chargeable only with the exercise of that care, which, under similar circumstances, would be exercised by ordinary men ; quoted with approval by LOTT, C., in *Eaton v. Erie R. Co.* (51 *N. Y.* 551) : “ If plaintiff uses ordinary care he cannot be deemed to have contributed to the negligence ” (*Centee v. Furney*, 17 *Barb.* 94, 97, and cases cited ; *Eakin v. Brown*, 1 *E. D. Smith*, 36).

III. None of the exceptions taken by the defendant's counsel to the refusal of the learned judge to charge specifically as requested, were well taken. In considering these exceptions, we ask the court to examine the whole charge in connection with the several requests ; keeping in view the following rule as laid down by the court of appeals in *Sperry v. Miller*, 16 *N. Y.* 413. “ In considering whether a single proposition contained in a charge is erroneous, it is to be construed in connection with the context. The whole charge, or so much of it as is connected with and tends to modify or explain the part claimed to be objection-

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able, is to be considered in determining whether an error has been committed. Admitting that the part of the charge excepted to, when isolated from the context, is erroneous, yet a new trial is not to be granted for that cause, when it appears that the jury could not have been misled thereby."

IV. It was not error for the judge to refuse to charge the ninth request in the phraseology asked, and the exception to the refusal is not well taken. This request embraces three distinct propositions, and if either of them is not correct, it was not the duty of the court to charge as requested. The rule is stated in *Carpenter v. Stillwell* (11 *N. Y.* [1 *Kern.*] 79), as follows: "That a request must be in such form that the judge may properly charge in the terms of the request without qualification" (*Haggart v. Morgan*, 5 *N. Y.* 422; *Hunt v. Mayber*, 7 *Id.* 266). 1st. We deny "That the defendant was entitled to the *unrestricted* use of its rails for the progress of its cars" (*Baxter v. Second Avenue R. R.*, 3 *Rob.* 511; *Hegan v. Eighth Avenue R. R.*, 15 *N. Y.* 380. See opinion of MONELL, J., in the case at bar, 33 *N. Y. Super. Ct.* 188, overruling the *dictum* in *William v. Eighth Ave. R. R. Co.*, 3 *Bos.* 320; *Fettretch v. Dickinson*, 22 *How. Pr.* 248). 2nd. We have shown that the plaintiff was *not unnecessarily* on the track." 3rd. We deny the correctness of the proposition, that "if by reason of plaintiff's being there the collision occurred, the plaintiff cannot recover, even though the conductor and driver of the car were negligent." Surely a car-driver cannot with impunity, *negligently* drive over and injure a person, although such person may be for the moment *unnecessarily* on the track (*Kenyon v. N. Y. C. & H. R. R. Co.*, 5 *Hun*, 479, and cases there cited; *Green v. Erie R. R. Co.*, 11 *Hun*, 333).

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BY THE COURT.—FREEDMAN, J.—The issues were re-tried in strict conformity with the law as laid down by the majority of the commission of appeals in 65 *N. Y.* 554. Under that decision the trial judge was not at liberty to grant a non-suit or direct a verdict for defendant. Whatever differences there were between the testimony of the last and the preceding trial, rather strengthened than weakened plaintiff's case. All questions involved were, under the law laid down for the guidance of this court, fully and fairly submitted to the jury, and their verdict cannot be disturbed as being against the weight of evidence or excessive. Nor can I discover any error in the admission of evidence, or the refusals of the learned judge to charge otherwise than he did charge, or the refusal to grant a new trial.

The judgment and order appealed from should be affirmed with costs.

SANFORD, J., concurred.

Statement of the Case.

MARTHA DIVINE RODERIGAS, PLAINTIFF AND
APPELLANT, v. THE EAST RIVER SAVINGS
INSTITUTION, DEFENDANT AND RESPONDENT.

I. ADMINISTRATION, LETTERS OF.

1. JURISDICTION OF SURROGATES OF STATE OF NEW
YORK, TO GRANT.

(a) *Depends on what.*—On the surrogate's judicial determination, made in a judicial inquiry before him, that death has occurred.

1. WHAT IS NOT SUCH DETERMINATION AND INQUIRY.

(a) Where the surrogate signed forms of letters of administration in blank, and left them in charge of a clerk, appointed by him, who, on application being made to him for letters, filled up a blank form of petition therefor, caused the petitioner to sign the same, and swear to the same before him, passed on the sufficiency of the evidence, and then filled up one of such blank forms of letters, and either himself, or by another clerk, affixed thereto the seal of the surrogate's court, and then delivered said form so signed in blank, so filled up, and so sealed, to the petitioner, upon the execution of the bond required by statute; the surrogate never having seen the petitioner, nor the petition, nor the blank form of letters after it had been filled out, and never having given any instructions as to said blank form so filled out, or as to the issuing letters on the estate of the person over whose estate said blank form so filled up purported to appoint an administrator; *there is no such determination and inquiry.*

VOID. Such instrument so purporting to be letters of administration is void.

2. RECITALS IN, NOT PRIMA FACIE EVIDENCE, WHEN.

(a) *Recital of death* of party upon whose estate the letters pur-

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port to issue, is not *prima facie* evidence of a fact on which jurisdiction rests, and is not the recital of a jurisdictional fact.

3. VOID LETTERS, WHO NOT PROTECTED BY.

- (a) Payment on the faith of letters void for want of jurisdiction to the person thereby undertaking to be appointed administrator of a debt due to, or money of, the alleged deceased, *will not protect the party so paying*, against an action brought therefor by the alleged deceased, he being in fact still in life.

II. JUDICIAL POWERS AND FUNCTIONS.

1. DELEGATION OF. They cannot be delegated.

- (a) **MAXIM.** The maxim *delegata potestas non potest delegari* applies.

1. *Surrogate* therefore cannot delegate the power to inquire and determine as to death.

(b) ACT 1850, CHAPTER 201, EFFECT OF.

1. It does not authorize the surrogate to delegate such power to his assistants, nor does it of itself confer such power on them.

1. It merely *confers on the surrogate's assistants the ministerial power* of administering oaths, and does not confer an authority to make a judicial inquiry or render a judicial determination.

III. JURISDICTION, WANT OF.

1. *Effect of.* Renders void the judgment of any court.
 2. *Attacking for want of.* He against whom a judgment is relied on, may attack it for want of jurisdiction, and show by evidence *dehors* the record, the non-existence of jurisdictional facts, and this although the record recites their existence.

- (a) The doctrine of *Bolton v. Jacks* (6 Robt. 166), approved and sustained in this respect.

IV. SURROGATES' COURTS.

1. *Nature of.* They are courts of limited and special jurisdiction.
 2. *Result from this.* The party (other than a ministerial officer) relying on its orders or decrees, has the burthen of proving the jurisdictional facts.

3. *Recital.* When not *prima facie* evidence of jurisdictional facts.
 See Administration, Recitals, *supra*.

V. PROCESS WITHOUT JURISDICTION.

1. WHO PROTECTED BY.

- (a) *Ministerial officers*, who are bound by law to execute the process.

1. The protection is confined *strictly to them*.

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2. WHEN PROTECTION AFFORDED TO THEM.

(a) When the subject-matter of the suit or proceeding is within the jurisdiction of the court issuing the process, and nothing appears on its face to show that the person was not also within it.

3. WHO NOT PROTECTED.

See Administration, Void Letters, *supra*.

Before SANFORD and FREEDMAN, JJ.

Decided January 7, 1878.

Appeal by plaintiff from judgment dismissing the complaint.

On October 1, 1867, plaintiff deposited with defendant \$485; and on the same day she and her husband deposited with defendant in their joint names, the further sum of \$485. Plaintiff and her husband had for many years prior to this resided, and carried on business, at Paradara, on the Island of Cuba; and these deposits were made while they were on a temporary visit to this country. Shortly after making the deposits they returned to their residence on the Island of Cuba, and resumed their business there. On March 4, 1871, plaintiff's husband died at Paradara.

On May 31, 1872, plaintiff demanded of defendant the said two deposits, and the interest thereon. Defendant refused to pay, on the ground, that it had already, on May 29, 1869, paid the same to one Isabella McNeil, upon the faith of a certain paper purporting to be letters of administration, issued on 2nd day of April, 1869, by the surrogate of the county of New York, to said Isabella McNeil, upon the goods, chattels, &c., of the plaintiff. Such paper recited that plaintiff departed this life intestate, at or immediately previous to her death an inhabitant of the county of New York, by means whereof the ordering and granting of let-

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ters of administration, etc., appertained to the surrogate of the county of New York; but did not recite that the surrogate had made inquiry as to the death of the plaintiff, and had determined that she was deceased.

The case was tried once before, and plaintiff had judgment, the court, at special term, holding that the surrogate at common law had no jurisdiction to grant letters of administration on the estate of a person in being, and that the statutes of this State had not conferred such jurisdiction; that the letters issued in the case were consequently void; and that, therefore, the fact of payment to the person named in them as administratrix did not stand in the way of plaintiff.

The general term affirmed this decision.

On appeal to the court of appeals, the judgment was reversed and a new trial ordered (63 N. Y. 460); that court holding that jurisdiction depended, not on death in fact, but upon a judicial determination by the surrogate, upon a judicial inquiry had before him, that death had occurred; and that, from the evidence as it stood in the then appeal book, it appeared that the surrogate had made such judicial determination as to the death of the plaintiff.

On the re-trial evidence (which is particularly mentioned in the opinion), was given to the effect that the surrogate had made no such judicial determination.

The plaintiff's complaint was dismissed on the re-trial, and an appeal was taken.

Culver & Wright, attorneys, and *S. Jones*, of counsel for appellant, among other things, urged:—*First*. We presume it is not open to argue before this tribunal any of the questions which have been passed on by the court of appeals in this case; we do not, however, waive the points heretofore presented, but for ulterior purposes insist on them. Those points briefly are: (1)

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That at common law the surrogate had no jurisdiction over the estate of a person in being ; and consequently the letters of administration issued in this case were wholly void and did not stand in the way of plaintiff's recovery. (2) That neither section 26, art. 2, title 2, chap. 6, part 2, *R. S.*, nor any other law or act passed by the legislature of the State, or any proceeding had thereunder, gave, granted or vested in the surrogate any jurisdiction to grant letters of administration on the estate of a person in being, and that the surrogate did not and could not by any proceedings under any law or act of the said legislature, obtain jurisdiction to grant letters of administration on the estate of a person in being. (3) That any act or law passed by said legislature, assuming by its own force or by proceedings had thereunder to give the surrogate jurisdiction to grant letters of administration on the estate of a person in being, is unconstitutional.

Second.—I. If the surrogate had no jurisdiction to issue the letters in question, they are wholly void, and a payment upon them does not stand in the way of plaintiff's recovery. (1) This was determined by the general term of this court, and is not denied by the court of appeals.

II. The court of appeals has, however, decided that a surrogate has jurisdiction to issue letters upon a judicial determination made by him, upon a judicial inquiry before him, that death has occurred ; in other words, that the jurisdiction of the surrogate depends, not on death in fact, but on his judicial determination, made in a judicial inquiry before him, that death has occurred. (1.) It follows that if no judicial inquiry has been had before the surrogate, and no judicial determination of death been made by him, the fact, on which the jurisdiction to issue letters depends, is wanting, and the letters are without jurisdiction and void. (*a*) It will not do to say that death has in fact occurred, for the

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jurisdiction under the court of appeals decision does not rest on that fact. (b) It will not do to say that sufficient facts, circumstances and evidence exist upon which the surrogate might determine in favor of death ; because the jurisdiction does not depend upon the existence of such facts, circumstances and evidence, but upon the surrogate's judicial determination upon them. (c) It will not do to say that evidence of death satisfactory to a clerk in the surrogate's office was presented to such clerk, and that such clerk acted thereon ; because it is the judicial determination of the surrogate which is required—not that of a mere clerk. The power to be exercised is a judicial power, and cannot be delegated.

Third.—Defendant's counsel in the court below claimed that the action and proceedings had before the clerk were a sufficient compliance with the statute, and by virtue thereof there was jurisdiction to issue the letters ; and in support of the proposition he relied on *Laws of 1850*, ch. 201 ; *Matter of Will of Daniel Clark*, 1 *Tucker*, 119.

I. As to the law of 1850 : it provides that the assistants appointed by the surrogate “ shall have power to administer and certify oaths and affirmations in all cases in which said surrogate is authorized to administer the same ; ” then provision is made for the collection of fees for the services performed under the act and the payment thereof into the treasury of the city and county of New York. (1) The authority to administer oaths and affirmations does not include or confer authority to make a judicial inquiry or render a judicial determination. (2) By section 62 of chap. 460 of the *Laws of 1837*, a surrogate was authorized to administer oaths in all cases where it might be necessary in the exercise of the powers and duties of such surrogate. (a) The power given to clerks by the law of 1850 is that given to the surrogates by the act of 1837. It is

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mere ministerial power. (b) The surrogate is a constitutional officer and to be elected (*Laws* 1847, vol. 2, § 14).

II. As to the case of Daniel Clark, 1 *Tucker*, 119. The surrogate in this case regards the functions which the act of 1850 authorizes the clerk to perform, as subsidiary, ministerial functions, and as intended to relieve the surrogate *from the detail of mere clerical duty*. (a) He intimates a doubt whether without this act the surrogate could delegate *even ministerial functions*.

Fourth.—I. The want of a jurisdictional fact may always be shown to avoid a judgment, decree or other judicial or ministerial proceeding, even though the existence of such jurisdictional fact may be recited in the record (*Bolton v. Jacks*, 7 *N. Y. Superior Court*, 193 to 203, and cases there cited).

II. In the court below defendant claimed that want of jurisdiction could not be shown, and relied on *Martin v. Hood*, 8 *Johns*. 45. 1. This case, so far as it tends to hold that want of jurisdiction may not be shown against recitals in the records, is clearly overruled by *Bigelow v. Stearns*, 19 *Johns*. 33; *Bolton v. Jacks*, *supra*, and cases there cited. 2. This case, however, does not sustain the proposition.

III. But we are not compelled in this case to invoke the doctrine that recitals in a record of jurisdictional facts may be disproved. 1. The surrogate's court is one of special and limited jurisdiction, and a party relying on any of its judgments, decrees or orders must show jurisdiction. Parol or other evidence outside of the record may be adduced in support of jurisdiction, and recitals in the record of jurisdictional facts are *prima facie* evidence thereof (see cases *supra*). 2. The jurisdictional fact in this case (under the decision of the court of appeals) is a judicial inquiry had before, and a judicial determination made by, the surro-

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gate. 1. Defendant introduced no proof even tending to show this. 2. There is no recital of this fact in any record produced on the trial. 1. The letters of administration merely recite that Martha Devine departed this life intestate. (a) The court of appeals, however, has determined that jurisdiction does not depend on the fact of death. 2. Neither the letters of administration nor any other record contain a recital that the surrogate, on an inquiry had before him, had determined that Martha Devine had departed this life intestate. (a) The court of appeals has decided that the jurisdiction to issue letters depends on such a determination by the surrogate.

J. W. C. Leveridge, attorney, and *S. P. Nash*, of counsel, for respondent, urged as follows:—This is a second trial of the case decided by the court of appeals in 63 *N. Y.* 460. The only new facts proved on the second trial, are that the proceedings in the surrogate's office, which the court of appeals held were a protection to the defendant paying over the money claimed under them, were had before the surrogate's clerk and not before the surrogate himself. These facts cannot change the result. 1. The reason of the rule which confers protection upon parties obeying the judgments and process of courts of justice, is based on public policy. The protection does not depend upon the proper performance of his duties by the judicial officer, after he has acquired jurisdiction, and the court of appeals has held that the presentation of a proper application confers the jurisdiction. That the surrogate did not in person pass upon the application, does not impair the protection of a third person acting on the faith of the letters issued under the hand and seal of the surrogate, and all evidence on this subject should have been excluded (*Savacoal v. Boughton*, 5 *Wend.* 170 ; *Stanton v. Schell*, 3 *Sandf.* 323 ; *Chegaray v. Jenkins*,

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1 *Seld.* 376). 2. The surrogate's clerk has by statute powers which, when coupled with the surrogate's own signature and seal, make the entire act that of the surrogate (Matter of Daniel Clarke, 1 *Tucker*, 119). The judgment should be affirmed, with costs.

BY THE COURT.—FREEDMAN, J.—The court of appeals has held that the surrogate, in granting letters upon the estate of the plaintiff, who was not then dead, acted judicially ; that under the statutes of this State, he had jurisdiction to issue the letters upon a judicial inquiry and determination by him, that death had occurred ; and hence, that the letters so granted protected the defendant as an innocent third party as to the amount paid to the administratrix on the faith of the letters, though they were, in fact, granted on false evidence.

This determination was made upon the construction of the statutes of this State regulating the jurisdiction and proceedings of surrogates' courts, and it was held, that the said statutes furnish a complete system ; that in enacting the same, the legislature intended to confer upon surrogates' courts sole and exclusive jurisdiction over the subject of granting letters of administration, and as part of that jurisdiction to determine, upon sufficient evidence, the facts upon which their action must rest ; that, if the case be a proper one, the surrogate must act and issue letters ; and that thereupon the letters so issued are conclusive evidence of the authority of the administrator, until reversed on appeal or revoked.

The conclusion was reached by a vote of four to three, and in the prevailing opinion of EARL, J., it was conceded that the question decided was not free from doubt ; that a decision either way would be confronted with some authority, and meet with some logical difficulties.

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As far as it goes, the decision rests upon the assumption that there was a judicial inquiry into, and determination of, the question of death, by the surrogate, in due course of judicial proceedings.

It has now been shown, however, and the court below has found as facts, that the petition was presented, not to the surrogate, but to the clerk in the office of the surrogate, who was entrusted by the latter with the duty of entertaining such applications ; that said clerk drew up the petition, swore the applicant thereto, passed upon the sufficiency of the evidence presented, and thereupon either himself filled up, or caused another clerk to fill up, a printed blank form of letters of administration *signed in blank* by the then surrogate of the city and county of New York ; that upon said blank being filled up, said first-named clerk attached thereto the seal of said surrogate's court, and delivered the same to the applicant upon the execution by her of the bond required by statute ; and that the then surrogate of the county of New York neither saw the applicant, nor the petition, nor the letters of administration, after the same had been filled out as aforesaid, and gave no instructions in respect to or regarding the issuing of the said letters.

Upon these facts and findings, which were not before the court of appeals, and plaintiffs' exceptions to the main conclusions of law found by the learned judge below, two important questions arise,—namely, first, as to the competency of the testimony establishing these facts, and secondly, as to the effect to be given to the facts as found.

As to the competency : The court of appeals having held that the jurisdiction to issue letters in this case depended, not on death in fact, but on the judicial determination of the surrogate, made after a judicial inquiry, that death had occurred, it seems to follow as a logical and necessary conclusion, that if there were

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no such judicial inquiry and determination, the fact on which the jurisdiction to issue the letters depends, is wanting, and the letters are without jurisdiction, and void.

Such want of jurisdiction may be shown by proof outside of the record, for no court, no matter how general its jurisdiction may be, which proceeds without jurisdiction in a particular case, can make a valid record, or confer any rights.

In *Bolton v. Jacks*, 6 *Robt.* 166, in which case the authorities on this point were examined by this court with great particularity, the rule was stated as follows: "Want of jurisdiction will render void the judgment of any court, whether it be of superior or inferior, of general, limited or local jurisdiction, or of record or not; and the bare recital of jurisdictional facts in the record of a judgment of any court, whether superior or inferior, of general or limited jurisdiction, is not conclusive, but only *prima facie* evidence of the facts recited; and the party against whom a judgment is offered, is not, by the bare fact of such recitals, estopped from showing, by affirmative facts, that they were untrue."

In *Boller v. The Mayor, &c.*, 40 *N. Y. Superior Ct.* 523, this court was called upon to, and did, re-examine the rule thus laid down, in the light of the criticism which *Bolton v. Jacks* had undergone in the court of appeals in the case at bar, and the conclusion was reached that, though the soundness of the decision was impugned in so far as it proceeded upon the assumption that the habitation of a testator at the time of his death was a jurisdictional fact, which, if erroneously decided by the surrogate in admitting a will to probate, might be collaterally attacked,* the correct-

* The criticism here alluded to is to found in Judge EARL's opinion (63 *N. Y.* 469), and is as follows: "In *Bolton v. Jacks* (6 *Robertson's Sup. Ct. R.*), there is a learned discussion of the question of the jurisdiction of courts, and it was there held that if a surrogate

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ness of the rule itself, as above stated, was not questioned.

It having therefore been already decided that there is nothing in the language of the court of appeals in the case at bar inconsistent with the general doctrine of *Bolton v. Jacks*, the case last referred to must be considered as a controlling authority in favor of the competency of the testimony adduced by the plaintiff in opposition to the letters relied upon by the defendant.

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admitted to probate a will of a testator, not at the time of his death an inhabitant of his county, he acted without jurisdiction, and that his proceeding was void and could be attacked collaterally. I believe the decision to be unsound in this respect."

It may be suggested that neither the reasoning which led the learned judge to the conclusion he arrived in the case then under consideration by him, nor the principle on which the decision of that case rests, affords ground for the criticism.

The case of *Roderigas* turned upon and was decided wholly on the effect of section 26, art. 2, title 2, chap. 6, part 2, R. S., which the court held invested the surrogate with power to judicially inquire and examine as to the death of any person upon whose estate letters of administration were applied for, and to judicially determine as to such death; and that his judicial determination of death was conclusive, even though the fact were otherwise. The court agreed that were it not for this section and the effect given it, jurisdiction would depend on *death in fact*.

This section of the R. S. has no application to the proof of wills.

The provision concerning the proof of wills is to be found in chapter 460 of the Laws of 1837, at p. 524.

Neither in that chapter nor in any other statute, is there any section or provision requiring the surrogate to inquire into the habitation of the testator, or imposing on him any duty to make such inquiry, or authorizing or requiring him either to examine witnesses on that subject or to subpoena, or authorizing or requiring him to make any determination on that subject.

It would seem that a decision and reasoning founded on said section 26 of the R. S. cannot affect or impugn a decision made in a case to which that section has no application, and as to which there is no similar provision.

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are courts of limited and special jurisdiction, and yet their jurisdiction to grant administration upon the estates of deceased persons is general and exclusive.

With respect to courts having general jurisdiction, the intendment of law is always in favor of the validity of their judgments. In regard to tribunals of limited and special jurisdiction there is no such intendment, and every fact necessary to uphold their jurisdiction must either appear by the record, or be affirmatively shown by evidence *aliunde*. In either case the bare recital of jurisdictional facts in the record is not conclusive, but only *prima facie* evidence of the facts recited.

In the present case the defendant introduced no proof outside of the record relied upon showing a judicial inquiry and judicial determination, and of the record the letters of administration simply recite the fact that Martha Divine departed this life intestate, which is not enough, as it has been determined that jurisdiction does not depend upon the existence of that fact, but upon a judicial determination of it made in the course of judicial inquiry.

This record and all presumptions properly arising therefrom, if any, the plaintiff meets with proof showing that whatever inquiry was made, was made, not by the judicial officer clothed with the powers of the surrogate, but by his clerk; that whatever determination was had, was made in the like manner; and that all this was done by said clerk, in the absence of the surrogate and without consultation with or instructions from him so far as this particular case is concerned.

Even if it be claimed, therefore, that as regards the letters in question the same presumption attaches as to jurisdiction and regularity that attaches in any other case to the judgment record of a court of original and general jurisdiction,—and this is the theory most favorable to the defendant,—the presumption, it seems to

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me, has been completely destroyed by affirmative and uncontradicted testimony to the contrary.

I concede that if the proof simply showed an erroneous or negligent or improper performance by the surrogate of his duty after he had acquired jurisdiction, the letters so issued would be good in law.

But the proof goes beyond that. It shows that he did not act judicially at all; that he refused to act in such cases; that he considered the examination of the petition a mere ministerial function, and that he delegated that function to the clerk. Such delegation might not be open to legal objection, if the jurisdiction of the surrogate in issuing letters depended, as has been heretofore supposed, on the fact of death. But as the court of appeals has determined that the surrogate must act judicially, and that his jurisdiction in issuing letters depends upon a judicial determination to be made by him in the course of a judicial inquiry, the delegation of power referred to cannot be sustained, any more than the practice could be sustained, if the judges of a court of original and general jurisdiction were to authorize the clerk of their court, upon presentation of applications sufficient in form, to pass upon the sufficiency of the evidence produced, and the sureties offered, and if deemed sufficient, to fill up and issue orders of arrest, injunction, appointment of receivers, and warrants of attachment, which had been previously signed by them in blank.

Judicial power cannot be delegated, because it involves the exercise of judgment and discretion (*Powell v. Tuttle*, 3 *Comst.* 396; *Keeler v. Frost*, 22 *Barb.* 400).

True, a *ministerial* officer is protected in the execution of process whether the same issue from a court of limited or general jurisdiction, if the subject-matter of the suit is within that jurisdiction, and nothing appears upon the face of the process to show that the

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person was not also within it, although the court have not, in fact, jurisdiction in the case (*Savacool v. Boughton*, 5 *Wend.* 171). And in *Chegaray v. Jenkins* (1 *Seld.* 376), this principle was extended to a constable acting under a warrant in due form, issued by the receiver of taxes of the city of New York, and directing the collection of a tax.

But this protection is confined strictly to ministerial officers who have no discretion, but are bound by law to execute the process entrusted to them. As to all other parties, the record, and the process issued thereon, may be impeached for want of jurisdiction. In *Stanton v. Schell* (3 *Sandf.* 323), cited by defendant's counsel, the judge had acquired jurisdiction under the non-imprisonment act, and hence it was held that subsequent errors of judgment did not oust him of his jurisdiction, nor subject him or the applicant to an action of trespass or false imprisonment.

It is insisted, however, that the proceedings before, and the action by the clerk in question, coupled with the surrogate's own signature and seal, were a sufficient compliance with the statute; and in support of this proposition reference is made to ch. 201 of *Laws of 1850*. By that statute power is conferred upon the assistants appointed by the surrogate of the city and county of New York, to administer and certify oaths and affirmations in all cases in which said surrogate is authorized to administer the same. By § 62 of ch. 460 of the *Laws of 1837* a surrogate was authorized to administer oaths in all cases where it might be necessary in the exercise of the powers and duties of such surrogate, and the power given to the assistants or clerks named in the statute of 1850 is that given to the surrogates by the act of 1837. It is a mere ministerial power, which was conferred for the purpose of relieving the surrogate of the city and county of New York from the detail of mere clerical duty, and that is the extent

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of it as construed by the surrogate himself in the case of Daniel Clarke (1 *Tucker*, 119). But it does not include or confer authority to make a judicial inquiry or render a judicial determination.

The surrogate of the city and county of New York is a constitutional officer, and to be elected. No provision of law exists which enables him to delegate his judicial functions to subordinates, nor can any existing statute be construed to work that result.

The case as now presented differs from that presented to the court of appeals in the particulars herein discussed, and the judgment appealed from cannot be sustained upon the facts as found.

The judgment should be reversed and a new trial ordered with costs to the appellant to abide the event.

SANFORD, J., concurred.

NOTE.—This case having attracted so much attention in legal circles, and the decision of the court of appeals having been reviewed in the *American Law Review*, vol. 10, No. 4, p. 787, and also in the *American Law Register, N. S.*, vol. 15, p. 212, it has been deemed proper to publish with the foregoing general term opinion, the special term opinion rendered on the first trial of the cause, which was concurred in by the general term, it not having been heretofore published.

The following is the opinion:

“SPEIR, J.—The question in the case is, Had the surrogate jurisdiction to grant the letters of administration which protect the defendants in making the payments to Isabella McNeil? The only justification for doing so as claimed is, that they paid upon the strength of the letters issued by the surrogate of the city and county of New York. It must be conceded if he had no jurisdiction it would be no protection.

“The defendants claim through their counsel, in order to sustain the surrogate’s jurisdiction for their protection, chiefly upon the ground that the State appoints, by judicial authority, certain persons, who upon the death of an individual, administer upon his personal property, and although the State does not profess to administer it unless the individual be in fact dead, there are many cases where the question of death, like other questions of fact, is difficult of ascer-

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tainment, and that in such cases it is within the legitimate province of the State, on presumptive proof of death, to authorize administration on his estate, establish tribunals to take such proof, providing safeguards sufficient to make the sanction of its judicial authority a protection to third parties.

"They claim that the State of New York has done this, and the cases at bar are to be determined by its statutory law alone.

"Section 26, article 2, title 2, ch. 6, vol. 2, *R. S. (Edmonds' Ed.)* p. 75, is relied on. 'Before any letters of administration shall be granted on the estate of any person who shall have died intestate, the fact of such person dying intestate shall be proved to the satisfaction of the surrogate, who shall examine the persons applying for such letters on oath touching the time, place, and manner of the death, and whether or not the party dying left any will; and he may also in like manner examine any other person, and may compel such person to attend as a witness for that purpose.'

"Again, it is provided that 'the letters testamentary and of administration and letters appointing a collector, granted by any officer having jurisdiction, shall be conclusive evidence of the authority of the persons to whom the same may be granted, until the same shall be reversed on appeal, or revoked as in the chapter provided' (2 *R. S.* 80, § 56).

"In section 26 it is assumed by the very letter of the statute, that the proceedings take place only when 'any person shall have died intestate,' the fact of such person dying intestate shall be proved to the satisfaction of the surrogate.

"The court is not authorized to act except when the fact exists that the person shall have died intestate.

"The court is set in motion by the admitted jurisdiction that such person has died intestate, and the proceedings are carried forward only upon that assumption. So in section 56, the proviso is that certain letters issued by an officer having jurisdiction shall be conclusive, &c. This the defendant's counsel says means 'granted by the proper officer, and on proper proceedings taken before him, and if it means that the letters are a protection only in case the proof before the surrogate was conclusive, the section is useless.'

"With great respect I think the learned counsel assumes the premises for the sake of his deduction—jurisdiction here is conceded, and therefore the surrogate is authorized to issue certain letters, but it does not follow that he has authority to issue them under all circumstances, and much less where he has not the acquired jurisdiction. Nor, in logical terms, can the section be said to be useless, for the court acting within the sphere of its original authority, the letters

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issued by an officer acting under such authority should be taken as conclusive, both as a useful and orderly proceeding on well settled principles.

“Section 47, 2 *R. S.* 70, is claimed to cover the whole ground assumed by the defendants. It is in the words following: ‘All sales made in good faith, and all lawful acts done either by administrators before notice of a will, or by executors or administrators who may be removed or superseded, or who may become incapable, shall remain valid and shall not be impeached on any will afterwards appearing, or by any subsequent revocation or superseding of the authority of such executors or administrators.’

“This section, like all others on this subject, is founded upon the fact that the surrogate shall and must have jurisdiction over the subject matter before he could deliberate on the case.

“The proper surrogate obtains control over the personal estate of deceased persons only upon their death.

“He acts upon the estate, either through administrators according to the statute of distributions, or through executors according to the provisions of a will.

“Having acquired jurisdiction by the event of death, the question whether there was a will or not as determining the mode of distribution, falls within his province, and his action either in granting letters of administration or probating a will, as the case may be, cannot be attacked collaterally. By the actual facts of death and inhabitancy, the surrogate acquires jurisdiction over the whole subject; and his action in granting letters of administration cannot be attacked for want of jurisdiction. In case of a will being subsequently proven, relief could be obtained by application to the surrogate himself for a revocation of the letters of administration, in which case, as the grant of letters of administration was avoidable only, the acts done under it would be valid. In *Prosser v. Wanger*, 1 *Com. B. N. S.* 289, both the death of the party and the granting the letters by the proper officer was conceded. See also *Sheldon v. Wright*, 5 *N. Y.* 497, as to the necessary result of the principles there laid down. The statute of 1870, 1 *Laws of 1870*, p. 826, is also referred to as sustaining defendant's position. He claims that it being remedial it may well retroact.

“The answer to this is, that ‘All lawful orders and decrees in proceedings in the surrogate's court . . . and the objection of want of jurisdiction, except by appeal in the manner prescribed by statute, &c.,’ relate only to the case where such original jurisdiction has been acquired, and is to be construed in harmony with other statutes on the subject (1 *Kent's Com.* p. 524, 525, 10 Ed.) I hope to show pre-

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sently it is not in the power of the legislature to confer jurisdiction on a surrogate over the estates of a living person.

“In the case at bar the parties not being dead, all the proceedings were totally void, and consequently the payment to an executor or administrator appointed where the supposed testator or intestate is alive, would not be a discharge of the debt.

“I think it may well be conceded that upon evidence being furnished, according to the rules and principles of evidence and the law, establishing the fact of death and of intestacy, the surrogate would be bound to issue letters, but this is done at the peril of the applicant in case death should not in fact have occurred. But as already shown, a compliance with such duties never, by the statutes of this State, gives him jurisdiction when the supposed intestate or testator was in actual being. The surrogate must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. Yet, his decision that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or power of an administrator. The case is not within his jurisdiction (*Griffith v. Frazer*, 8 *Cranch*, 9, Opinion of Marshall, C. J.).

“The defendants’ counsel’s position is, that admitting there are cases in the books to the effect that administration granted during the lifetime of a person upon his estate is void, because the ecclesiastical courts have jurisdiction only in the estate of dead persons (*Allen v. Dundas*, 3 *T. R.* 125 ; *Griffith v. Frazer*, 8 *Cranch*, 24), yet they do not override the statute of New York, which provides for a judicial inquiry into the fact of death, and that there is no New York case which decides otherwise.

“I think the assertion too broad and not well considered. Sections 3 and 5 of chapter 79 of the *Laws of 1813* (*Laws 1813*, p. 445) are analogous to those before cited. Section 5 of the act of 1813 is in substance the same as section 26 of R. S. In fact, the act of 1813 goes further than the R. S., for it requires in express terms that satisfactory proof shall be made of the *death of the party*, as well as that he died intestate, while R. S. does not require proof of the death of the party except as going to establish the fact required to be proved,—that is, that the party died *intestate*.

“The court of appeals held, in *Sheldon v. Wright*, 5 *N. Y.* 497, 510–512, that this provision in section 5 of the act of 1813 was merely directory, and did not affect the surrogate’s jurisdiction, but that his jurisdiction depended on the actual existence in fact, *first*, of the death of the person, and, *second*, that at his death he was an inhabitant of the county in which the surrogate who issued the letters

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was empowered to act. It clearly appears by reference to sections 3 and 5 of the act of 1813, that upon the existence of the above two facts, the same surrogate, who would, in case there was no will, have power to grant letters of administration, would, if there were a will, have power to probate it and issue letters testamentary thereon. In *Sheldon v. Wright*, the non-existence of a will is not put as one of the facts on the *actual existence* of which the jurisdiction to issue letters of administration depends, and the *actual existence* of the will is not one of the facts on which the jurisdiction to admit a paper purporting to be a will to probate, and to issue letters testamentary thereon, depends. If neither one of the above two matters does not *actually exist* as matters of fact, the surrogate is without jurisdiction, while if both do exist as matters of fact, the same surrogate has complete jurisdiction over the whole subject, either to grant letters of administration or letters testamentary, as the case may require, and his action in granting one or the other could not be attacked for want of jurisdiction, but could be reversed or modified only by a court of review or in pursuance of sound statutory remedy. See decision of the case of *Sheldon v. Wright*, by the learned judge in *Bolton v. Jacks*, 6 *Robertson*, 221-222.

“The above provisions of the Revised Statutes did not cover the case of a will, but the act of 1837 did, and the two together give to the surrogate precisely the same jurisdiction as the act of 1813, with but one substantial difference, viz., the act of 1813 gives no jurisdiction to grant letters of administration, or to admit wills to probate in certain cases when the decedent was not an inhabitant of this State.

“The additional clauses in section 26 of Revised Statutes respecting the examination of a party on oath, and the subpœnaing and compelling the attendance of witnesses, are merely express enactments of power implied in the direction given by section 5 of the act of 1813, being necessary to a compliance with such direction (1 *Kent's Com.* 525, 10th Ed.). The case of *Sheldon v. Wright* seems to me to be an exposition of the law of this State on this subject, and controlling over the case at bar.

“At common law, administration granted upon the estate of a person in life was wholly void, even though granted by a court which had full power and jurisdiction over the granting of letters of administration (*Allen v. Dundas*, 3 *T. R.* 125; *Griffith v. Frazer*, 8 *Cranch*, 1; *Joachimson v. Suffolk Savings Bank*, 3 *Allen*, 87).

“The above and cases therein cited are directly in point. The case in 3 *Allen* rests its decision upon the principles of the English laws, and does not depend upon any peculiar statute. The cases of *Carter v. Buchanan*, 2 *Kelly*, 337; *Noel v. Wells*, 1 *Lewis, S. R.* 235,

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and *Prosser v. Wagner*, 1 *Com. B. N. S.* 287, referred to by the defendant's counsel, do not apply the case at bar. The party, whose will was offered for probate, being conceded to be dead, the question whether the paper propounded was his will or not, was the question which the court was authorized to determine.

"It is difficult to break the force of the case of *Joachimson v. Suffolk Savings Bank*, as bearing directly on the case at bar, and it furnishes a direct adjudication in favor of the plaintiff's recovery. Neither the legislature nor the courts have power to confer jurisdiction on surrogates over the estates of living persons. The foundation of the theory of distribution of estates, whether under statutes of distribution or according to provisions of wills, rests upon the event of death. 'No person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.' The substance of these provisions have been incorporated in all our State constitutions. They are simple and comprehensive, and I do not perceive that they derive any additional force or meaning by any historical review of the many learned disquisitions of jurists on the causes and sources of their origin. These provisions mean, that whenever the citizen acquires rights under the existing fundamental law, there is no authority given to the law-making power to take them away. In this State, as in others, they are imposed as restraints upon the legislature, and whenever the rights of property are admitted to exist, the legislature cannot say they shall exist no longer, nor will it make any difference, even though a tribunal like the surrogate's court should be appointed to pronounce the judgment. *Bronson, C. J.*, in *Taylor v. Porter*, 4 *Hill*, 146, says : 'It must be ascertained judicially that he (the citizen) has forfeited his privileges, or that some one else has *superior rights to the property he possesses*, before either of them can be taken from him. It cannot be done by mere legislation.'

"I cannot find any definition of property which does not include the power of disposition and sale as well as the right of private use and enjoyment. *Blackstone* says (1 *Com.* 138) ; 'The third absolute right of every Englishman is that of property, which consists in the free use and enjoyment and disposal of all his acquisitions without any control, or diminution, save only by the laws of the land.' *Chancellor Kent* says (2 *Com.* 320) : 'The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself ;' and, again (p. 326) : 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.'

"The object of the constitution is not to grant legislative power,

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but to confine and restrain it ; without the constitutional limitation, the power of the legislature to make laws would be absolute.

“It follows, from these elementary principles, that property is sacred and inviolable in the possession of living persons, and is equally so by *transmission* on their death, whether by will or intestacy.

“The power of the legislature to confer on a surrogate any jurisdiction over the estate of a living being, comes within the constitutional prohibition, and is absolutely void, and no act of the legislature can give it validity.

“The plaintiff must have judgment for the amounts claimed in both cases, and interest, with costs.

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WILLIAM G. BURNETT, PLAINTIFF AND APPELLANT, v. G. BROWN SNYDER, IMPLEADED WITH PETER O. STRANG, AMMON B. PLATT, PHILIP C. LOCKWOOD, AND AMMON CLARK, SURVIVORS OF AMMON PLATT, DEFENDANT AND RESPONDENT.

I. *Partnership.*

1. WHAT WILL NOT RENDER ONE LIABLE AS A PARTNER.

(a) SUB-PARTNERSHIP. An agreement entered into between one partner in a firm and a third person, whereby the third person is to receive a certain proportion of such partner's share in the profits of the firm, and pay to such partner a corresponding proportion of the losses of the firm, constitutes a sub-partnership, and does not make the third person a partner in the firm either *inter sese* or *quoad* other parties.

1. *Clause that third party is a copartner in firm.* The insertion in such an agreement of a clause “that it is hereby agreed, by and between the parties hereto, that A. B. (the third party) is a copartner in the firm of ———, this day formed,” will not, if the agreement is entered into without the knowledge and consent of the other partners, make the third party a partner in the firm, either *inter sese* or *quoad* other parties.

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2. WHAT WILL RENDER ONE LIABLE AS A PARTNER.

1. JOINT OWNERSHIP. One who becomes a joint owner with a partner of his share in a partnership standing in his name alone, with the knowledge and consent of all the members of the firm, is liable as a partner.

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

Decided January 7, 1878.

There were three successive partnerships having the firm name of Strang, Platt & Co. ; the first commencing in April, 1863, and terminating in the last of December, 1869 ; the second firm of Strang, Platt & Co., spoken of as firm No. 2, and being the partnership in question in this action, commencing on the first day of January, 1870, and terminating in April of the same year by the death of Mr. Ammon Platt, one of the partners ; the third firm, sometimes spoken of as the Chapman firm, commencing in the spring of 1870, and terminating on the first day of January, 1871, or the last day of December, 1870.

This action is brought to recover moneys deposited with Strang, Platt & Co., No. 2, by plaintiff. Defendant Snyder alone defends.

The question presented in the case is, whether defendant Snyder is liable as a partner in the firm of Strang, Platt & Co., No. 2.

Plaintiff claims that he is. The facts on which the claim is based are in substance as follows.

On December 31, 1869, written articles of copartnership were entered into between all the defendants except Snyder, whereby a copartnership was formed under the firm name of Strang, Platt & Co.

About the same time a written instrument, dated December 31, 1869, was made and executed between defendants Strang, Ammon Platt, and Snyder. This instrument is set forth in the opinion. There is no

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evidence that either of the other defendants had any knowledge or notice of this agreement. It appears that plaintiff had been in the employ of each of these firms during the period of their respective existences.

The defendant Snyder took no part in the conduct of the business of the firm of Strang, Platt & Co., No. 2 (or in any of the firms of that name), paid no money into it, and received nothing out of it. He was never held out to the public or to the plaintiff as a member of the firm of Strang, Platt & Co., No. 2, or of any of the firms of that name.

The plaintiff dealt with the said firm of Strang, Platt & Co., No. 2, and the other firms of that name, without any belief or idea that the defendant Snyder was a member of such firms or any of them.

The referee before whom the issue was tried held that defendant Strang was not liable to plaintiff; and delivered the following opinion upon the question of his liability as partner :

J. S. BOSWORTH, Referee.—The principal question in this case is this,—was C. Brown Snyder a member of the firm of “Strang, Platt & Co.,” which was formed December 31, 1869, by articles of copartnership, signed by each of the above-named defendants, except C. Brown Snyder. If he is to be deemed to have been a member of that firm, or to be liable as such to its creditors, this must result from written articles of agreement, dated the same day as the said copartnership agreement entered into by and between C. Brown Snyder, and the above-named Peter O. Strang & Ammon Platt. This last said agreement recites the fact, that all of the aboved-named defendants except C. Brown Snyder had that day formed a copartnership, “under the firm name of Strang, Platt & Co., for the purpose of doing a wool brokerage and commission business in the cities of New York and Boston, and

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whereas it is deemed expedient and for the interest of said firm that the aforesaid C. B. Snyder, party of the first part, should have an interest, and become a copartner in the said firm of Strang, Platt & Co.," and then proceeds and concludes thus, viz.: "Now therefore know all men by these presents, that it is hereby agreed by and between the parties to this contract, that the said C. B. Snyder is a copartner in the said firm of Strang, Platt & Co., this day formed, and in consideration of this agreement and for other valuable considerations, the said C. B. Snyder shall and he is hereby entitled to receive from the said Peter O. Strang & Ammon Platt, one-third of the profits earned and received by each of the aforesaid parties of the second part from their interest in said firm of Strang, Platt & Co., and it is further agreed by the said C. B. Snyder, that he will become liable for and pay to the said Strang & Platt, an amount equal to one-third of any and all loss, that the said Strang & Platt, or either of them may sustain or be charged with by reason of their connection as copartners or otherwise with Strang, Platt & Co. It is further agreed by all the parties to this contract, that they will each and all of them do all that they can, and to the extent of their ability, to sustain, further and protect the interest of the said firm of Strang, Platt & Co., and that they shall at all proper times during the continuance of this copartnership and agreement give each other true and exact statements of the affairs and accounts of the firm. This agreement to commence with the said copartnership of Strang, Platt & Co., and to continue until the same is dissolved as provided for in the said articles of agreement, and it is further understood and agreed by the parties to these presents that they hereunto bind themselves, their heirs, executors, administrators and assigns. In witness whereof, &c."

There is no evidence that either of the other de-

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fendants had any knowledge or notice of the existence of this agreement. The plaintiff was employed by this firm from its commencement until it was dissolved by the death of Ammon Platt, on or about April 24, 1870. He was also employed by a firm of Strang, Platt & Co., which preceded the firm of that name, formed December 31, 1869, and he was also employed by a firm of that name formed shortly after the death of Ammon Platt, and about May 1, 1870, and continued in such employment until last said firm was dissolved. He loaned to, or deposited moneys with each of said firms from time to time, aggregating many thousands of dollars, and did not believe, until some time in 1875, that C. B. Snyder was a member of the firm now sued, or of any firm of that name. Instead of C. B. Snyder being held out to the plaintiff, or to others dealing with the firm, either by Snyder himself or by P. O. Strang or by Ammon Platt, as being a member of this firm of Strang, Platt & Co., or in any way interested in its business, or the results thereof, there seems to have been care and caution used not to do or say anything to induce or lead any one to suspect that he was in any way interested in the firm or in the profits of its business. Hence the practical question is, what is the legal effect of the agreement between Snyder of the one part, and P. O. Strang and Ammon Platt, of the other part, of the date of December 31, 1869. Omitting for the present any consideration of the words, "it is agreed . . . that the said C. B. Snyder is a copartner in the said firm," the agreement provides that Snyder shall receive and be entitled to receive from P. O. Strang and A. Platt, one-third of the profits "earned and received" by each of them "from their interest" in the firm; and that he shall pay to them "an amount equal to one-third of any and all losses that they or either of them may sustain or be charged with" as such copartners.

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This is not an agreement, even if full effect be given to it according to its terms, as against everybody, that Snyder shall share generally in the profits of the firm, as profits, but only that he shall share with P. O. Strang and Ammon Platt, the profits which they may derive and receive from their interest in the firm. This does not give, or attempt to give, to Snyder any special lien on the profits of the concern. It does not give, or attempt to give to Snyder, a certain share of the whole profits, but only a specified part of a share thereof.

“He does not receive this part of a share, nor is he entitled to interfere with it all, to say whether it shall be more or less in amount, until it has been actually set out, and the time has come for a division between him only and the partners with whom he has contracted. Of course he has nothing to do with the general firm or its creditors, or they with him; nothing with the general firm, because they have not assented to his being a partner; nothing with the creditors thereof, because he is not in fact a partner; and on the case supposed” (which is strictly true of this case) “he has not held himself out as such, nor does he draw out of the general concern any of its profits” (*Collyer on Partnership*, note 1). This extract from Mr. Perkins’ note on the cases reported up to the time it was written expresses, as I think, the rule which they establish; and subsequent decisions have not modified it. *Fitch v. Harrington* (13 *Gray*, 468), relied on by plaintiff’s counsel as a case in point in his favor, does not, in any thing decided by the court, conflict with it. The court in that case granted a new trial, not so much because the judge erred in his charge to the jury by stating as law what was not law, as because the court thought that the statement of the rule should be accompanied with explanations which would more fully instruct the jury as to its correct application. *Reynolds v. Hicks* (19 *Ind.* 113), is in point, and in favor of the defendant.

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All elementary works to which my attention has been called, hold, on the facts of this case, that Snyder was not a member of the firm, but a sub-partner of P. O. Strang and Ammon Platt. Such an agreement as the one under consideration constitutes what is called in the books a sub-partnership. It makes the parties to it, partners *inter sese*; but it in no way affects the other members of the principal firm. There does not seem to be any authority for saying that, because a stranger to the firm shares in that way, and in that sense, the profits of the firm, he can be made liable to parties dealing with it, as if he were a partner therein (1 *Lind. Part.* 53). The clause in the agreement, viz: "it is hereby agreed by and between the parties to this contract that the said C. B. Snyder is a copartner in the said firm of Strang, Platt & Co.," did not and could not make him such a partner. That result could not be effected without the consent of the other members of that firm. It made the three, as between themselves, members of that firm, in such sense and to such extent as the clauses of the contract in relation to sharing in the realized profits of P. O. Strang and Ammon Platt, and paying to them an amount equal to one-third of their losses, made them all members of that firm. That made them partners as between themselves, but did not make Snyder a partner in the firm of Strang, Platt & Co.

If this agreement had been shown to the plaintiff before he made the loan on which a recovery is sought a question might arise which the case does not now present.

Having reached on this branch of the case the conclusion expressed, a very careful consideration of the other grounds of defense is rendered unnecessary.

After the delivery of this opinion, a re-argument of the case was had and the referee subsequently delivered another opinion.

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J. S. BOSWORTH, Referee.—This action involves the question whether there can be an agreement between one of several members of a firm and a third person, when made without the knowledge or consent of the other parties, by which that one partner is to pay a specified part of the profits, which he may earn and receive as such partner, to such stranger, without such stranger being thereby made liable for all the debts of such firm to its creditors.

Collyer, section 194, states the rule thus :

“ A stranger may share the profits of a particular partner with whom he contracts, and, not being engaged in the general partnership, will, of course, not be liable for their debts, and, upon the bankruptcy of the particular partner, may prove against his separate estate ” (*Vide Lindley Partn.* vol. 1, p. 53, 55).

I am not referred to any adjudged case which holds to the contrary.

There is a class of cases which hold that a third person who receives a sum equal to a specified part of the profits, as a compensation for his services, is not liable as a partner to third persons, notwithstanding that it is intended that such third person is to be paid, and is in fact paid, this specified part out of the profits. And the rule, in its application, includes cases where, in addition to a salary, the third person is to receive a specified part of the profits, if any are made, he having nothing to do with the losses (*Vanderburgh v. Hull*, 20 *Wend.* 70).

The reason for extending exemption from liability as partners to the creditors of the firm in the class of cases last stated, is said to be that it is an arrangement made simply in reference to the measure of compensation (*Id.*). *Burckle v. Eckhart* (*Coms.* 132, 138), SHACKLAND, J. (dissenting), argued that “ the person who receives of the profits, as profits, of a concern, any amount, although in the name of wages, or compensa-

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tion for services, should not be exempt from liability as partner to the creditors of the firm."

It is essential, to make a person liable as a partner who is not in fact a partner, that he has a right to a share of the profits of the business, as such.

In *Heimstreet v. Howland* (5 *Denio*, 68), this rule was carried to the length of holding that the lessor of a ferry for a year, upon an agreement that the lessee should take charge of the business, pay all the expenses, and pay over to the lessor one-half of the gross receipts of the ferriage, did not thereby make himself liable to third persons as a partner of the lessee.

In that case the lessor took half of the gross proceeds, and, of course, more than one-half of the net profits, but what he received was as a compensation for the lease of his ferry. The court held: "There must, to constitute a partnership, be a vested interest in the profits in the person sought to be charged as partner, such as would, for that reason alone, entitle him to an account in equity, against the other persons concerned in the business." I understand the court to be here speaking of cases where a third person is sought to be charged solely on the ground of his right to participate in the profits. It is in the same sense, as I suppose, that the court say, in *Fitch v. Harrington* (13 *Gray*, 474), that, "An agreement between one copartner and a third person, that he shall participate in the profits of the firm, as profits, renders him liable, as a partner, to the creditors of the firm, . . . but if such third person, by his agreement with one member of the firm, is to secure compensation for his labor, services, &c., in proportion to the profits of the business of the firm, without having any specific lien on the profits, to the exclusion of other creditors, he is not liable for the debts of the firm."

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That case is relied on by plaintiff's counsel as directly adjudicating the rule for which he contends.

That case states that there was evidence tending to show "that the share in the concern standing in the name of Leonard Harrington (one of the members of the firm), was owned jointly by Leonard and Samuel P. Harrington," who was sought to be charged as a partner (*Id.* 468).

It will be observed that in the statement of facts, in the charge of the judge, and in the opinion of the court, there is no allusion to the question whether this joint ownership of a share, if it existed, was with or without the knowledge and consent of the other partners. The judge charged (*Id.* 470), "That if the share in the partnership concern, which stood in the name of Leonard Harrington only, was owned jointly by him and Samuel P. Harrington, then Samuel P. was liable in this action; but if there was a sub-partnership between Leonard and Samuel P., by which Samuel P. was to share in the profits of the firm to which Leonard was entitled, this alone would not make Samuel P. liable for the debts of the firm." If the judge, in this part of the charge, and the court in its opinion, had in mind, as a fact, that the joint ownership by the two Harringtons of the share standing in the name of Leonard only, was created with the knowledge and consent of all the members of the firm, the rule that such joint ownership, with such knowledge and assent of all the members of the firm, would make Samuel P. liable as a partner, no one, probably, would dispute. It would seem that such fact would make them partners *inter sese*. In such case each would be interested in the whole profits of the business, as profits, by consent of all the partners, and Samuel P. would have as much right to his share of the profits, as profits, to the exclusion of individual creditors of Leonard, as any

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member of the firm would. The court concluded its opinion that "In order to enable the jury to decide whether Samuel P. Harrington was liable for the debts of the firm of Whittemore, Harrington & Co., by reason of a sub-partnership between him and Leonard Harrington, they should have received instructions more definite and discriminating than they could derive from the mere words of Mr. Collyer. The kind of agreement which would render Samuel P. liable for the debts of the firm, and the kind of agreement which would not render him liable therefor, should have been so explained to them that they might intelligently decide whether the agreement between the two (if any was proved), was such as did or did not render Samuel P. liable as a partner for the debts due from the firm to the plaintiffs. The other instructions given to the jury seem to us to have been unexceptionable."

Judicial opinions should be read remembering that they are written in view of the facts of the case in which they are delivered.

There is nothing in this opinion that intimates that an agreement between Leonard and Samuel P. Harrington, made without the knowledge and consent of the other members of the firm, that Samuel P. should be paid by Leonard one-third of the profits, which the latter should earn and receive as a partner, would alone make Samuel P. liable for the debts of the firm.

That is the question in this case, whatever it may have been in that.

Snyder had no money or capital stock in the firm of Strang, Platt & Co. ; the agreement between him and P. O. Strang and Ammon Platt was unknown to the other members of the firm, and Snyder was not expected to be able, or to be permitted, to take personally any part in the conduct of the affairs of the

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firm, or in the transaction of its business. He was not to be, and he was not held out by himself or others as, a member of the firm. And the plaintiff, who was an employee of the firm during its continuance, had no belief or suspicion that he was a partner until over five years after its dissolution.

On principle the case seems to me to be as strong in favor of Snyder as the cases of *Vanderburgh v. Hull*, *Burckle v. Erhart*, and *Heimstreet v. Howland* (*supra*) are in favor of the persons they held exempt from liability.

Snyder had no property or interest in the profits of the firm of Strang, Platt & Co., as such. It is conceded that an action in his favor would not lie against the firm for an accounting. He had no power to compel an adjudication between the members of the firm of the amount of profits earned by P. O. Strang and Ammon Platt, respectively, and as between himself and P. O. Strang and Ammon Platt he had no claims against them until they had received profits, or their right to them, as between them and their co-partners, was clear and indisputable, and then his right of action would be against P. O. Strang and Ammon Platt only. Anything which they might pay to him out of profits they had received from the firm, and after they had received it, he would not receive as profits of the firm, but as a share of their realized profits, which, but for their agreement with him, they might pay to their individual creditors, or otherwise dispose of, as to them might seem meet.

Newland v. Tate (3 *Ired. Eq. N. C.* 226), contains nothing in conflict with the views here expressed. In that case two persons were partners in a government contract for carrying the mails in stage coaches. After the contract was made, the defendant J. H. Tate agreed with his brother, Robert W. Tate, that the two brothers, as between themselves, became part-

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ners in the original share of J. H. Tate; the whole business was under the personal care and management of the two Tates jointly, though chiefly that of Robert W., who received the fare of passengers in the coaches in which the mail was carried, the pay from the government, and made the disbursements, and finally sold the stock and contract to one Wilson, and received the contract price. The court held that the three were not copartners *inter se*, and that Robert H. Tate could not be compelled to account as a partner of the plaintiff, but could be compelled, as agent, to account.

The only passage in the opinion affecting the case in hand is this: "Thus accounting, it is true, he will not be directly liable to the plaintiff for any losses sustained, if any there be, unless by his own fault as agent; because, although he might be liable for the contracts of the firm to third persons as a partner, yet he was not a partner as between themselves, to share the profit and loss."

In that case, Robert H. Tate had become owner of one-half of his brother's interest in the capital stock, and was to have half of his brother's share of the profits as such, and took an active control of the business as the agent of the firm, and of course in the protection and furtherance of his own interest, and with the knowledge and consent of all the partners. That is not this case.

Buckley v. Bramhall (24 How. Pr. 455), was decided on the ground that the statutes in relation to limited partnerships made Bramhall liable as a general partner, because he was interested in the partnership, and false statements were made in the certificate and affidavit by which the partnership was formed. They stated that Marks (the special partner) contributed \$20,000 of the capital, whereas Bramhall contributed \$8,000 of it.

The facts in that case are in no wise like the facts

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of this case, and the question on which this case turns is not alluded to in the opinion in that case.

The cases cited by plaintiffs upon the question of the effect of the participation in the profits of a firm where such participation was held to make him liable as a partner, are cases where such third person became entitled to share in the whole profits of the firm as profits, and might probably be said to have a property in them as they accrued and before they were divided.

Parsons on Partnerships, in his last edition (p. 89), after analyzing and commenting on all the cases, says (in a note): "We think the cases show that there are but two grounds upon which a man can be held liable as a partner to third persons; . . . if he has not been held out as a partner he can be chargeable as such only when he holds that relation to profits which we believe to be the ultimate test of partnership, both *inter se*, and as to third persons; that is, unless there is some ownership in or of the profits, as they accrue, and are not yet divided into portions."

In *Wheatcroft v. Hickman* (*House of Lords*, 9 *J. Scott, N. S.*; 9 *Eng. Com. Law N. S.* 94 [*95]), Lord Cranworth said:

"I can find no case in which a person has been made liable as a dormant or sleeping partner in which the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when therefore he would stand in the position of principal towards the ostensible members of the firm as his agents."

The firm of Strang, Platt & Co. was composed of five members. There is nothing in this case indicating that three of them knew C. Brown Snyder—certainly nothing that they knew of the agreement between him and P. O. Strang and Ammon Platt. These three could not be his agents, nor he in any sense their principal.

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The business was not carried on for him, or for him together with the five. It was carried on for the firm, and by its members, and by them only. He had no property in, or ownership of, the profits as they might exist undivided. If he had a right to any part of the profits as profits, it was only to one-third of P. O. Strang's and Ammon Platt's realized profits, after they had received them, or they had been set apart for them.

Unless, therefore, clauses of the contract other than those relating to the payment by P. O. Strang and Ammon Platt of one-third of their realized profits to Snyder, and his agreement to pay to each of them a sum equal to one-third of the losses with which they should be charged, create a liability which these clauses would not create, Snyder is not liable for the debt owing by the firm to the plaintiff.

The whole contract, if practicable, should be so construed as to make its parts harmonious.

Upon the clause stating that the parties to the contract agree that "C. B. Snyder is a copartner in the said firm," I made such comment in my former opinion as seems to me to be appropriate. He certainly was not a partner in the firm notwithstanding, as the other three partners had not consented to it. He did not thereby become one as to third persons, unless the agreement as to sharing in Strang and Ammon Platt's part of their profits, when realized, made him such.

An agreement between P. O. Strang, Ammon Platt and C. B. Snyder, "that Snyder is a member of that firm," and that only, he having no interest in the business or profits, would not make himself liable as such to third persons dealing with the firm, without any suspicion or belief that he was a partner.

The testimony of C. Brown Snyder as to the circumstances under which he executed that agreement, and upon what solicitation he did it (and as to which he

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is uncontradicted) if it may be considered in construing the paper and arriving thereby at the intent of the parties, would not lead to the conclusion that any other effect should be given to this clause than that first suggested.

The clause by which the three agreed to do all they could "to sustain, further and protect the interest" of the "said firm," and that each should give to the other "exact and true statements of the affairs and accounts of the firm," seems to me unimportant. Snyder could not know anything about the affairs of the firm, except what he might acquire from Strang and Ammon Platt, and he could not have any accounts of the firm's business, as such, to render, unless Strang and Ammon Platt should furnish them to him.

In what way it was contemplated that Snyder could protect the interest of the firm is not very obvious. He might possibly loan money to it, or get its paper discounted, or borrow paper for its accommodation.

If it had so happened that he had received anything from Ammon Platt and Strang as a part of their realized profits, or had paid anything to them to reimburse them for losses with which they had been charged, there might be accounts to be rendered by each of the three to the other; but these accounts would be accounts of those sub-partnership transactions and not statements of the affairs and accounts of the firm.

After a careful consideration of the able argument of plaintiff's counsel, and of the authorities on which he principally relies, my conviction is, that C. Brown Snyder was not a partner in the firm of Strang, Platt & Co., and is not liable to its creditors, by reason of having signed the agreement between him, P. O. Strang and Ammon Platt, of December 31, 1869.

Martin & Smith, attorneys, and A. P. Whitehead,

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of counsel, for appellant, urged:—I. The defendant Snyder must be held to be a partner, because he agreed to receive a portion of the profits, and to share the losses. The reason why sharing in the profits makes one a partner is, that he thereby deprives creditors of part of the means of payment. This is the well settled law of this State (See *Manhattan Brass Co. v. Sears*, 45 *N. Y.* 797; *Leggett v. Hyde*, 58 *Id.* 272). It is of no moment that the defendant Snyder did not agree to receive his share of the profits directly from all the partners, but only through the intervention of two of the partners. The principle is the same. Snyder is just as much a sharer in the profits, although he obtains them through the machinery of two of his partners, as if he received his share of the profits directly from the partnership fund.

II. The position taken by counsel for the defendant Snyder, to the effect that the defendant Snyder was a sub-partner, and that he is not liable to the creditors of Strang, Platt & Co. for the firm debts, is untenable. As matter of fact, it appears that Mr. Snyder was not a sub-partner, but that he expressly agreed to become a member of the copartnership of Strang, Platt & Co., and to take a share of the profits, and bear a share of the losses, with two of the members, and to act as a partner in the business of the firm. It is not a case where an agreement is made with one member of a partnership for a share of his profits; it goes farther, and is an agreement by Snyder to become a member of the copartnership. But assuming that Snyder could be called strictly a sub-partner, nevertheless, inasmuch as he was to take a share of another partner's profits, and to bear a share of another partner's losses, he is liable for the debts of the copartnership. The cases cited before the referee by counsel for defendant Snyder, to maintain his proposition (with the exception of the case in 19 *Ind.* 113), do not touch the question

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whether a creditor can recover against a sub-partner, but extend only to the question of the right of a sub-partner to compel the other partners to account, and to similar questions. The precise question involved in this case has been very ably considered and decided, and the authorities quoted by the counsel for the defendant Snyder are explained and distinguished, in the case of *Fitch v. Harrington* (13 *Gray*, 468). It is there expressly held, that "an agreement between one partner and a third person, that the latter shall participate in that partner's share of the profits of the firm as profits, renders him liable as a partner to the creditors of the firm, although, as regards the other members of the firm, he is not their partner." The opinion of Judge Metcalf, on pages 472, 473, and 474, is clear and thorough, is based upon principle, and would seem to be conclusive upon this question. In the case of *Reynolds v. Hicks*, 19 *Ind.* 113 (cited by defendant's counsel), the facts will be found, on examination, to differ materially from the facts in this case. (1.) There was no agreement to become a partner. (2.) The defendant sought to be charged advanced money to a partner, who was bound to repay the money. See judge's opinion, pp. 114 and 116, (bottom of page). (3.) The case seems to have been loosely considered. There is no argument, no reference to authorities on the turning point of the case, and the opinion of the judge does not seem to be based upon any controlling principle. In the opinion of the referee, *Lindley on Partnership* is cited as an authority for the defendant Snyder, but a subsequent edition of the same author states a contrary view (See *Lindley on Partnership*, vol. 1, 3rd London edition, p. 55). The only decision in this State touching the question is a strong authority for the plaintiff (*Buckley v. Bramhall*, 24 *How. Pr.* 455).

Respondent's points.

Wilson & Wallis, attorneys, and *William G. Wilson*, of counsel, for respondent, urged:—I. The defendant Snyder was not a partner in the firm in question. It is abundantly shown that he took no part in the business, paid nothing into it, and received nothing out of it. It is also shown that he was not in any manner a party to the copartnership articles, although the firm was formed by a written agreement. The only ground then upon which he can be claimed to have become a partner is, that he was a party to Exhibit No. 1. If he is a partner at all, it is because this instrument makes him one. The plaintiff claims that the instrument has this effect: 1. Because it states that it is thereby agreed that Snyder is a partner; and, 2. Because of its provisions in regard to profits and losses. I. An agreement between Strang, Platt and Snyder, that the latter should be a partner in a firm already formed, and composed of Strang, Platt, Lockwood, Clark and A. B. Platt, could not be effectual to make Snyder such partner (*Story on Partnership*, §§ 3, 5; *Collyer on Partnership*, § 194).

II. Neither are the provisions in regard to profits and losses of such a character as to make the defendant Snyder a partner in the firm, or liable for its debts, even if they had been made with the knowledge and consent of three remaining members of the firm. It is now well settled, that to establish a partnership, the sharing in profits must be such as to entitle the alleged partner to an account as partner, and to a lien for his share of the profits (*Catskill Bank v. Gray*, 14 *Barb.* 471; *Holmes v. Old Colony R. R.*, 5 *Gray*, 58; *In re English and Irish Church, &c. Society*, 1 *Heming & Miller*, 85; *Cox v. Hickman*, 8 *House of Lords Cases*, 301; *Mollwo v. Court of Wards*, *Law Rep.*, 4 *P. Council*, 419, overruling *Grace v. Smith*). *Leggett v. Hyde*, (58 *N. Y.* 276), and *Manhattan Co. v. Sears* (45 *Id.* 797), are not authorities against this position, for, in *Leggett*

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v. Hyde it is found as matter of fact that the defendant had an interest in the profits as profits, that the agreement was that he should have an account of the business every six months, and a division was then to be made of the profits then appearing; and in *Manhattan Co. v. Sears*, it is said that there existed in fact—1, sharing the profits (*i. e.*, in the profits as profits), 2, sharing in the losses (*i. e.*, as losses of the business), 3, a right to inspect the books, and 4, a common interest in the stock (See also *Vanderburgh v. Hall*, 20 *Wend.* 70; *Heinstreet v. Howland*, 5 *Denio*, 68). But the contract which existed between this defendant and two of the members of the firm of Strang, Platt & Co. is one well known to the law by the name of sub-partnership, and it is well settled that the sub-partner has neither the rights nor the liabilities of a partner in the principal firm (*Dig. Lib.* 17, Tit. 2, § 20; *Exp. Barrow*, 2 *Rose*, 252; *Bray v. Fromant*, *Madd.* 5; *Brain v. De Tastet, Jacob*, 284; *Frost v. Moulton*, 21 *Beav.* 596). *Fitch v. Harrington* (13 *Gray*, 468), is claimed to be an authority against this doctrine, but is not so in fact. For the court distinctly recognize the contract of sub-partnership as one well known, and as one exempting the sub-partner from liability to creditors, and the decision goes upon the ground that the nature of a sub-partnership was not sufficiently explained to the jury. The court says: "In order to enable the jury to decide whether Samuel P. Harrington was liable for the debts of the firm of Whitemore, Harrington & Co., by reason of a sub-partnership between him and Leonard Harrington, they should have received instructions more definite and discriminating than they could derive from the mere words of Mr. Collyer. The kind of agreement which would render Samuel P. liable for the debts of the firm, and the kind of agreement which would not render him liable therefor, should have been so explained to them, that they might intelligently decide,

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whether the agreement between the two (if any was proved) was such as did or did not render Samuel P. liable as a partner for the debts due from the firm to the plaintiffs." *Reynolds v. Hicks*, 19 *Ind.* 113, is exactly in point, and holds that a sub-partner is not liable to the creditors of the firm.

BY THE COURT.—FREEDMAN, J.—The judgment should be affirmed with costs, for the reasons contained in the opinion of the referee who tried the cause.

CURTIS, Ch. J., and SANFORD, J., concurred.

JOSEPH NICKERSON, ET AL., PLAINTIFFS AND RESPONDENTS, v. EMIL RUGER, WILLIAM RUGER, AND RICHARD GURNEY, IMPEADED WITH ISAAC TAYLOR, DEFENDANT AND APPELLANT.

I. BONA FIDE HOLDER FOR VALUE OF NEGOTIABLE PAPER.

1. *Holder for value, who is.*

(a) SURRENDER OF PAST-DUE NOTE.

1. The holder of a past-due note surrendered it to the maker in consideration of having *previously* received from him a note made by a third person, payable to him, and indorsed by him, *which note was not due at the time of the surrender.*

HELD,

that this was parting with a valuable consideration, so as to shut out the equities between the maker and indorsee of the latter note.

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

Decided January 14, 1878.

Respondent's points.

Appeal from a judgment for \$2,050.81, entered upon a verdict in the plaintiffs' favor by direction of the court.

Charles S. Spencer, attorney, and of counsel for appellant, among other things, urged:—I. The respondents will probably contend that because they gave credit for the amount of this note upon an antecedent indebtedness, that that was sufficient consideration. Then our answer is, that that is not parting for value (*Stewart v. Small*, 2 *Barb.* 559; *Atlantic National Bank of New York v. Franklin*, 55 *N. Y.* 235; *Weaver v. Barden*, 49 *Id.* 286; *Turner v. Treadway*, 53 *Id.* 650; *Cary v. White*, 52 *Id.* 141; *Farrington v. Frankfort*, 24 *Barb.* 554; *Stalker v. McDonald*, 6 *Hill*, 812; *Coddington v. Bay*, 20 *Johns.* 646; *Evans v. Smith*, 4 *Bin.* 386; *Root v. French*, 13 *Wend.* 572).

II. This case differs from the cases reported in many of the books, wherein notes were exchanged, in this: that the consideration is truly expressed on the face of the notes so exchanged (*Wooster v. Jenkins*, 3 *Denio*, 187, and cases there cited; *Mickles v. Calvin*, 4 *Barb.* 304; *Mohawk Bank v. Corey*, *Hill*, 513; *Montross v. Clark*, 2 *Sandf.* 115; 4 *Duer*, 331). There are a number of exceptions that have not been criticised, but the most important have. But the extinguishment of a legal demand in its original form must be shown affirmatively, and it must appear to have been an actual, and intended extinguishment (*N. Y. Ex. Co. v. De Wolf*, 3 *Bosw.* 86, 97; *Farrington v. Frankfort Bank*, 24 *Barb.* 554).

W. W. Goodrich, attorney, and of counsel, for respondent, urged:—Upon the undisputed facts the plaintiffs were innocent holders for value before maturity. All testimony as to equities between Taylor

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and the defendants, was properly excluded (*Fenby v. Pritchard*, 2 *Sandf.* 151; *Swift v. Tyson*, 16 *Peters U. S.* 1; *Collins v. Gilbert*, 5 *N. Y. Weekly Dig.* 168; U. S. Supreme Court, Oct., 1876; *Park Bank v. Watson*, 42 *N. Y.* 490; *Day v. Saunders*, 1 *Ct. App. Dec.* 495; *Brown v. Leavitt*, 31 *N. Y.* 114; *Chrysler v. Renois*, 43 *Id.* 209; *Paddon v. Taylor*, 44 *Id.* 371; 1 *Parsons on Bills*, 196).

BY THE COURT.—CURTIS, Ch. J.—The defendants are sued as the makers of a promissory note, dated June 21, 1875, indorsed by Isaac Taylor, and payable four months from date. The defense is that the defendants were accommodation makers, no consideration passing between them and the indorser, or between him and the plaintiffs, and fraud.

The plaintiffs produced testimony on the trial, to the effect that for the note in suit they surrendered two past-due notes of Isaac Taylor, of \$1,500 each. These two notes were not surrendered until after the receipt by plaintiffs of the note in suit, which fell due October 23, 1875, and it is not shown when they were surrendered. The only witness on this subject testifies, that he cannot swear positively that they were surrendered before October 23, 1875, and that he does not positively know. Subsequently in his testimony he says he “will” swear that he delivered the two notes before the maturity of the note in suit; after that, he testifies he cannot fix any real date, and would not swear to it. The testimony of this witness is substantially that the plaintiffs surrendered the two notes that are claimed to have been the consideration parted with for the note in suit, previous to the maturity of the latter, but that he cannot specify the exact date.

The plaintiffs cite the case of *Fenby v. Pritchard*, 2 *Sandf.* 151, to sustain their position, but I find this case is overruled by the court of appeals in *Barnard v.*

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Campbell, 58 N. Y. 73, where it is mentioned in the opinion, by ALLEN, J., as "so at war with principles recognized as well settled by this court in analogous cases, that it cannot be regarded as well decided."

As the uncontradicted testimony shows that the plaintiffs surrendered or parted with the two Taylor notes before the maturity of the note in suit, the plaintiffs are not to be regarded as holders of the note subject to the equities between the defendants and Taylor. Consequently the defendants were not prejudiced by the refusal of the court to allow them to show what those equities were.

The judgment appealed from should be affirmed with costs.

SANFORD and FREEDMAN, JJ., concurred.

AUGUSTIN DALY, PLAINTIFF AND RESPONDENT,
v. CHARLES A. BYRNE, DEFENDANT AND
APPELLANT.

I. TRIAL, CONDUCT OF. APPEAL.

1. *General objection.*

(a) WHAT CAN BE RAISED UNDER ON APPEAL.

1. Such objections only, which, if specified, would have been decisive of the case, and could not have been met or obviated at the trial.

1. *E. g.*, In an action of libel, plaintiff, to prove malice, offered three subsequent publications by defendant, which were received under a general objection; on appeal, defendant urged that, malice being presumed, the only effect of these publications was to enhance

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damages, and they, being *per se* libellous, could not be used for that purpose.

HELD,

these grounds of objection could not, under the above principle, be entertained on appeal.

II. LITERARY RIGHTS.

1. *Dramatization of a novel.*

(a) RIGHT TO. One has a right to dramatize a novel, and such dramatization becomes his property, though there appears in it substantial similarity in plot, situation, and incidents to the novel.

1. *Ergo.* In an action of libel grounded on a charge made by defendant, that plaintiff had committed a fraud by producing a play and claiming to be the author of it, when in fact it was written by another person, and sent to him for examination, and wrongfully retained by him and produced as his own, evidence that the play, being a dramatization by the plaintiff of a novel, is substantially similar to the novel in plot, situation, and incident, is inadmissible.

III. TRIAL, CONDUCT OF. APPEAL.

1. *Remarks of the judge in passing on questions arising on the trial.*

(a) CASE ON APPEAL MUST SHOW WHAT, TO CALL FOR A NEW TRIAL.

1. It must show how the remark came to be made, in what way and in what connection it was called forth, so that the appellate court can see wherein, if at all, the appellant was injured.

2. *Exceptions to refusals to charge.*

(a) GENERAL EXCEPTION RAISES NOTHING FOR THE APPELLATE COURT TO ACT UPON.

1. So held of an exception in this form: "I also except to your honor's refusal to charge our requests."

IV. DAMAGES, EXCESSIVE, WHAT NOT.

1. In an action of libel, \$2,689.78 held not excessive.

V. LIBEL.

Vide divisions I, II, III, *supra*.

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

Decided January 14, 1878.

Appeal by the defendant from a judgment for

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\$2,689.73, entered upon a verdict in plaintiff's favor, and also from an order denying a motion for a new trial, and also from an order denying a motion to set aside the verdict of the jury.

Lockwood & Post, attorneys, and *Louis F. Post*, of counsel, for appellant, urged :—I. The first exception, the benefit of which is claimed by appellant, is to the admission of the article published in No. 15 of *The Dramatic News*. (1.) The articles in suit, if untrue, were libelous *per se*, and in contemplation of law malicious ; and as no proof to negative the legal presumption of malice would have been allowed, so none should have been taken to prove malice, except such as would have been also admissible in aggravation of damages. Malice, as a part of the cause of action, being already conclusively presumed (See *Townshend on Slander and Libel*, 3rd Edition, § 176 ; *Id.* 132, note 1 ; *Daly v. Byrne*, 1 *Abb. N. C.* 15, and note), the only effect of the proof excepted to was to enhance damages, and all the authorities are agreed that no subsequent publication can be used for this purpose (See *Burson v. Edwards*, 1 *Carter [Ind.]* 164 ; *Forbes v. Myers*, 8 *Blackf. [Ind.]* 74 ; *Mix v. Woodward*, 12 *Conn.* 292-3). (2.) The article admitted to prove malice, is itself libelous *per se* (See *Townshend on S. & L.* 3rd Ed. § 176), and to admit it in this action, is to render defendant liable to double punishment, as the same article may be made the basis of another action (*Mix v. Woodward*, 12 *Conn.* 292-3 ; *Frazier v. McCloskey*, 60 *N. Y.* 337 ; *Root v. Lowndes*, 6 *Hill*, 518 ; *Titus v. Sumner*, 44 *N. Y.* 266 ; *Runkle v. Butler*, 7 *Barb.* 260). (3.) If this article was considered by the jury in aggravation of damages, still it would not bar a suit upon the article itself as a substantive cause of action (*Campbell v. Butts*, 3 *N. Y.* 173).

II. The next exceptions are to the admission of

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articles published in Nos. 18 and 25 of *The Dramatic News*, respectively. (1.) The observations in Point I. also apply to these exceptions. (2.) These articles appear on their face to have been published after the commencement of the action, and on that ground alone were inadmissible (*Frazier v. McCloskey*, 60 *N. Y.* 337).

III. A witness was asked respecting the similarity of "Pique" to "Her Lord and Master." The questions were objected to and excluded, and defendant excepted. Prior to the offer of this proof, plaintiff had put in evidence, under defendant's objection and exception, and in proof of malice, an article published by defendant, charging this similarity. The questions were material, if this article was properly admitted, to prove the truth of the latter. We concede that this would be trying a collateral issue, but claim that the error was in opening the door (See Point II.). As the issue was raised by plaintiff, we had the right to meet it. It is the province of this court to determine which ruling was erroneous ; both cannot be correct.

IV. The plaintiff introduced in evidence (objection and exception taken), an article from the *New York World*, purporting to be a letter from Eleanor Kirke, the reputed authoress of "Flirtation." The letter, even if genuine, was immaterial ; and if material, it was not proved to have been written by Mrs. Kirke ; and if it had been proved, it was incompetent testimony. The ground taken by the justice, that it formed a part of a letter to the defendant from plaintiff's attorneys, is insufficient. No such letter appears in evidence, and if offered, might itself have been made the subject of objection.

The fact, which we concede, that Mrs. Kirke's letter in the "World," was referred to in a letter from plaintiff to defendant, which defendant published as a part

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of the libelous article (the second cause of action), has no effect. That article (the letter from plaintiff's attorneys was a part of it) cannot be enlarged by extraneous matter, even though referred to in the article, except for purposes of explanation. No explanation was necessary.

V. The defendant excepted to the refusal to admit in evidence in mitigation of damages, and in explanation of an exhibit of plaintiff, an article published in No. 24 of *The Dramatic News*. For the purposes of this argument, it is not claimed that this article could have been properly admitted if the plaintiff had not previously introduced in evidence an article from No. 25 of *The Dramatic News*. The article offered by defendant and excluded by the court, was published prior to plaintiff's exhibit, and explains it. The two should have gone to the jury together.

VI. In sustaining the objection referred to in Point V., the judge said, in the hearing of the jury: "I could not admit that article in evidence. The idea that a man can one day blackmail another man in that way, and another day turn round and make another statement, will never do." This remark may be considered in two aspects—(1) as in the nature of a charge to the jury; and, (2) as improper influence exerted upon the jury during the trial of a cause. (1) If we consider the expression objected to as in the nature of a charge to the jury, it was erroneous (*Vedder v. Fellows*, 20 *N. Y.* 126; *Burke v. Maxwell*, 16 *Albany L. J.* 209). (2) If we consider the expression as an improper influence exerted on the jury in favor of a party pending a trial, we shall find the only questions to be: Whether any influence was exerted; whether it was improper; and, whether it was in favor of a party to the cause. Under the authorities this expression calls for a new trial (*Thurman v. Chapman*, 45 *Barb.* 98; *Green v. Selfair*, 11 *How. Pr.* 260; *Cilley v. Bartlett*, 19 *N. H.* 324;

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State v. Hascall, 6 *Id.* 352 ; Perkins v. Knight, *Id.* 474 ; Coster v. Merest, 3 *Broderip & Bingham*, 272 ; Knight v. Inhabitants of Freeport, 13 *Mass.* 218). The case of Caldwell v. N. Y. Steamboat Co. (47 *N. Y.* 298), is not in conflict. In that case the jury had returned for instructions, when the circuit judge remarked that he thought there was not much difficulty in arriving at a conclusion. As the circuit judge had expressed no opinion on the merits, and given no intimation of what his opinion was, the court of appeals affirmed the judgment. The remark did not tend to prejudice either party against the other. This is the reason the appellate court did not interfere, and this is the only difference between the cited case and the case at the bar.

VII. When the defendant had rested (having examined two witnesses upon the bad character of plaintiff), counsel for plaintiff stated that he had sent for witnesses on the question of plaintiff's character, to which the court replied, in the hearing of the jury: "So far as regards the last witness, on the subject of character, you need not give yourself any trouble about it." To this remark, exception was taken. Here, again, the court erroneously invaded the province of the jury. It would have been proper to explain to the jury the principles which should guide them in weighing the testimony of a witness ; but it was for the jury alone to determine what weight to give to the testimony. The court had no right to say to the jury, or in their hearing of a witness whose testimony was pertinent to the issue, as the testimony of the witness referred to was, that they should not consider it,—and such was the clear import of the objectionable language (See authorities cited in Point VI.). It cannot be argued, to bring the case within some authorities, that this was a mere expression of opinion qualified by the judge in his charge when he explicitly left the question to the jury. He did leave to the jury, the question whether

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the defendant had proved bad character ; but he did not leave it to them to determine the credibility of this particular witness and the weight of his testimony. Taking the expression excepted to, together with the charge proper, the matter was left to the jury, in substance as follows : You are to pay no attention whatever to the testimony of the witness Hallam, but may consider whether, upon the testimony of Brown, the other witness on character, the defendant has proved the plaintiff to be a man of bad character.

Olin, Rives & Montgomery, attorneys, and *Stephen H. Olin*, of counsel, for respondent, urged :—I. The subsequent publications were properly received. The evidence offered was of the same character in each case, and offered for the same purpose, and the objections and exceptions were, except the first, in the same words. (a) The objections and exceptions state no ground. “The rule is settled beyond discussion that a general objection will be disregarded” (*Valton v. National Fund Life Assurance Co.*, 20 *N. Y.* 35 ; *Shaw v. Smith*, 3 *Keyes*, 316 ; *McDonald v. North*, 47 *Barb.* 532 ; *Requa v. Holmes*, 16 *N. Y.* 201 ; *Chester v. Dickerson*, 54 *Id.* 13 ; *Levin v. Russell*, 42 *Id.* 255 ; *Somerville v. Crook*, 9 *Hun*, 668 ; *Frazier v. McCloskey*, 60 *N. Y.* 339). (b) The evidence was properly received as proof of malice and in aggravation of damages. The rule is in England well settled that other publications by the defendants are admissible to show actual malice (*Folkard on Libel and Slander*, 459 ; *Barnett v. Levy*, 3 *H. L.* 395, 414 ; *Barnwell v. Adkins*, 1 *M. & Gr.* 807). And this although such publications are subsequent to the bringing of the action (*Pearson v. Le Martin*, 1 *Scott N. C.* 607. See also *Macleod v. Wakley*, 3 *C. & P.* 311 ; *Folkard on Libel and Slander*, 460 ; *Camfield v. Bird*, 3 *Car. & Kin.* 56 ; *Chambers v. Robinson*, *Str.* 691). Exactly in point is *Chubb v. Westly* (6 *C. & P.* 436).

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There is in this State some apparent conflict of decision (*Bissell v. Elmore*, 48 *N. Y.* 564; *Thorn v. Knapp*, 42 *Id.* 478). This case is distinguishable from *Frazier v. McCloskey* (60 *N. Y.* 337). In that case the charge made by defendant to the admission of which exception was taken was actionable *per se*. In the case at bar the articles complained of, or at least parts of each of them, would not have sustained an action, since they were within the bounds of legitimate criticism, while they showed, nevertheless, hostility and malice toward the plaintiff (See also *Thomas v. Croswell*, 7 *Johns.* 269; *Defries v. Davis*, 7 *Car. & Payne*, 112). (c) The learned judge in his charge directed the jury on this point properly and as requested by the defendant, thereby preventing the evidence admitted from having any improper effect.

II. The questions as to the resemblance between the play "Pique" and the novel "Her Lord and Master" were properly overruled. The three objections were properly sustained. (a) No authority exists for permitting a witness to state the resemblance between two writings, neither of which is in evidence, though both are within the reach of subpoena. The questions called for statements of the contents of writings not produced, and worse still, for the conclusion of the witness in regard to them. The rule heretofore followed in similar cases, is to cause the writings to be read in court (*Reade v. Sweetzer*, 6 *Abb. Pr. N. S.* 9; *Toole v. Young*, *Coryton on Stage Right*, 84; *Strauss v. Francis*, 4 *Fost. & F.* 939, 1107). The rule allowing witnesses to compare absent objects has always been based by the courts on necessity (*Hotchkiss v. Germania Ins. Co.*, 5 *Hun*, 90; *De Witt v. Barly*, 17 *N. Y.* 342; *Com. v. Sturtevant*, 117 *Mass.* 122). No such necessity exists here. (b) The witness was not competent to give the testimony asked for. He had never read "Pique," and had seen it acted only once,

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a year and four months before the trial. It did not appear when he had read "Her Lord and Master." Hence no foundation had been laid for his testimony. (c) The evidence sought was wholly immaterial (*Townshend on Libel*, 3rd Ed. 679 ; *Fitzgerald v. Stewart*, 53 *Penn.* 343 ; *Fountain v. West*, 23 *Iowa*, 9 ; *Andrews v. Vandeuze*, 11 *Johns.* 38 ; *Lamos v. Snell*, 6 *N. H.* 413 ; *Daly v. Munro*, *Sup. Ct. Sp. T.* 1876 ; *Reade v. Conquest*, 11 *C. B. (N. S.)* 479 ; *Boucicault v. Fox*, 5 *Blatchf.* 87). It was inadmissible in mitigation of damages (*Dolevin v. Wilder*, 34 *How. Pr.* 488). Nor could the evidence be offered to show the bad character of the plaintiff (*Townshend on Slander and Libel*, 3rd Ed. 679, § 407 ; *Inman v. Foster*, 8 *Wend.* 602 ; *Kennedy v. Gifford*, 19 *Id.* 296 ; *Mapes v. Weeks*, 4 *Id.* 659 ; *Watson v. Bush*, 5 *Cow.* 499 ; *Fitzgerald v. Stewart*, 53 *Penn.* 343 ; *Fountain v. West*, 23 *Iowa*, 9 ; *Andrews v. Vandeuze*, 11 *Johns.* 38 ; 1 *Greenl. on Evidence*, § 55 ; *Lamos v. Snell*, 6 *N. H.* 413). (d) Nor was the evidence material to prove statements in the articles from defendant's paper not sued on. If the evidence had been offered for this purpose, counsel should have so stated on the trial, and cannot now take advantage of this ground (Cases cited, *infra*).

III. The letter from the *World* was properly received. It had been read by the defendant, and had been referred to in the letter of plaintiff's attorneys written after the first, and printed in the second libelous article (*supra*).

IV. The article offered by defendant was properly excluded (*Townshend on Slander and Libel*, 3rd Ed. 687, and cases cited ; *Hotchkiss v. Olyphant*, 2 *Hill*, 510).

V. The remarks of the court were not subjects of exception. They were proper, and the charge prevented any possible injury from them.

VI. The damages were not excessive (*Fry v. Ben-*

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nett, 9 *Abb. Pr.* 45 ; Coleman v. Southwick, 9 *Johns.* 45 ; Southwick v. Stevens, 10 *Id.* 443 ; Knight v. Wilcox, 18 *Barb.* 212).

BY THE COURT.—CURTIS, Ch. J.—The plaintiff, a theatrical manager, sues the defendant, the editor of a weekly publication, called *The New York Dramatic News*, to recover damages for publishing two articles, charging him with committing a fraud by producing a play, and claiming to be the author of it, when in fact it was written by another person, and sent to him for examination, and wrongfully retained by him, and produced as his own.

The answer is a general denial, except as to the publication of the first article. It also presents, as pleas in mitigation of damages, that one Wheeler had so informed the defendant, and that the publication was without malice, and that plaintiff's character as a dramatic author was bad, and that he plagiarized from the productions of other people ; also that the play in question was plagiarized without material change from Miss Florence Maryatt's novel, "Her Lord and Master ;" also that he was willing to publish any statement the defendant chose to make, with the same publicity that he had given to the alleged libel.

The plaintiff offered in evidence as proof of malice four articles, subsequently published in *The Dramatic News*. To three of these, the defendant simply objected, assigning no ground of exception, and excepted to the ruling of the court. To the other article, being the first offered, the defendant objected to plaintiff's putting in evidence, subsequent articles to those in the complaint, unless the plaintiffs would allow the entire matter contained in *The Dramatic News*, relating to the plaintiff, to go in evidence. The defendant now claims that the court erred in admitting these articles, because malice being already

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conclusively presumed, their only effect was to enhance damages, for which no subsequent publication could be used, and further, that the articles being *per se* libelous, that to admit them in this action is to render the defendant liable to double punishment, as the same articles may be the basis of another action.

It was but just to the judge before whom the trial was being conducted, that these grounds of objection should have been stated to him, so that his attention would have been specifically directed to the reasons for the defendant's objections. If the defendant elected not to pursue this course, when he made these objections at the trial, where there was an opportunity of meeting them, or obviating them, he is too late in first assigning his grounds before the appellate court (*Levin v. Russel*, 42 *N. Y.* 255; *Chester v. Dickerson*, 54 *Id.* 13).

The defendant excepts to the rulings of the court, sustaining the objections of the plaintiff to the questions addressed to the defendant, asking him if he can state the differences between the plot of "Pique" the play, and the plot of the novel "Her Lord and Master," and if there is any difference, except in names, between the characters in the two, and if the situations and incidents are not substantially the same.

This evidence sought to be introduced was immaterial. The plaintiff had a right to dramatize the novel, and such dramatization became his property, though there appeared in it substantial similarity in plot, situations and incidents, to the novel.

If the defendant had been competent, and had given testimony to this effect, it would not have established anything either relevant to the issue or in mitigation of damages, and it was properly excluded.

The defendant offered in evidence a statement, published in *The Dramatic News*, after the commencement of this action. If the statement had been a

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withdrawal of the charges made, and had been intended as some reparation for the injury done, it would have been admissible in mitigation of damages. But the statement discloses no such intention on the part of the defendant, and the exclusion of it by the court is in accordance with the views expressed by Ch. J. NELSON in *Hotchkiss v. Oliphant* (2 *Hill*, 516). In sustaining the objection of the plaintiff's counsel, the judge said, in the presence of the jury: "I could not admit that article in evidence. The idea that a man can one day blackmail another man in that way, and another day turn round and make another statement, will never do." The defendant excepted to this remark, and claims that it is to be considered as a charge to the jury, or as "improper influence exerted upon them during the trial of a cause. It is clearly no part of a charge to the jury, and appears to have been called out by something stated by counsel, but which is not contained in the printed case. There is nothing in the pleadings to which the term "blackmailing" is relevant, and it may have referred to some hypothetical statement made by counsel. If the defendant was prejudiced by this observation of the court in sustaining the objection after a discussion between counsel, the case should disclose in what way, or in what connection it was called forth, so that the appellate court can see wherein, if at all, he was injured by its utterance in the presence of the jury. In determining what is admissible as evidence, both the court and counsel, in their consideration and discussion of questions, are uncontrolled by the presence of the jury, who are in no respect parties to the matter. The defendant, perhaps, with greater reason could complain that the reading of the not very mild language of Ch. J. NELSON, in the analogous case above cited, if it had been done at the time, exerted an improper influence upon the jury. In the charge that was made to the

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jury, there is nothing in this behalf stated unfairly by the court, or objected to by the defendant. To select a remark by the court to counsel, in the course of passing upon a question as to the admissibility of evidence; and then, without connecting it with the issue, but in its isolated form, to claim that there may be a surmise based upon it that influenced the jury, is an insufficient reason for granting a new trial.

The defendant excepted to another remark of the court which was made during the progress of the trial, not only in the presence, as in the preceding instance, but in the hearing of the jury. The plaintiff's counsel stated that he had sent for witnesses on the question of the plaintiff's character, to which the court replied, "So far as regards the last witness on the subject of character, you need not give yourself any trouble about it."

What has been said in the preceding paragraph applies, to some extent, to this. This remark was addressed to counsel, and is claimed by the defendant to be equivalent to directing the jury to disregard the testimony of this witness. The case shows that the memory of the witness referred to failed so much on his cross-examination, that what was said to the counsel by the court in reply, must have been quite apparent to the jury, whether they heard this conversation or not. The charge in respect to this witness was of a character to prevent any injury from the remark, and in this respect appears not to have been excepted to by the defendant.

There is no valid exception to the charge. The court charged all the defendant's requests but one, and when the court declined to charge that, no exception was then taken. At the close of the defendant's requests to charge, which were some ten in number, and after his exceptions to the charge, the defendant stated: "I also except to your Honor's refusal to

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charge our requests." It is said by ALLEN, J., in *Ayrault v. Pacific Bank* (47 N. Y. 476), that the court of appeals had uniformly held that exceptions in this form present no question for review.

The question whether the damages given are not excessive, is one that is not easily determined. But after such consideration as I have been able to give it, and in view of the fact that the publications were in a theatrical journal, circulating especially among those upon whom the plaintiff relied for his reputation and his business, and were of a character to injure him among them, I cannot say that the jury, after a full hearing of the testimony, were not the best judges of the amount of damages that should have been awarded to the plaintiff, or that they transcended the limits of a proper discretion in their verdict. The publications complained of by the plaintiff exceed the limits of just criticism. To be wrongfully held up to the public as the perpetrator of a literary fraud, and as wrongfully retaining and using the production of another, is a grave accusation. The wrong and the injustice are not easily measured pecuniarily. Nor can it be entirely overlooked, that where the courts fail to afford adequate redress, the public peace is liable to be disturbed by the acts of the sufferer, seeking violently to redress his wrongs.

The judgment and orders appealed from should be affirmed, with costs.

SANFORD and FREEDMAN, JJ., concurred.

Statement of the Case.

THE JAGGER IRON COMPANY, PLAINTIFF AND
RESPONDENT, v. HENRY H. WALKER, DE-
FENDANT AND APPELLANT.

I. CORPORATIONS.

1. *Manufacturing, organized under chap. 40, Laws of 1848.*

(a) STOCKHOLDERS; LIABILITY OF FOR DEBTS OF UNDER SEC-
TION 24.

1. Not liable (among other events) unless suit for the collec-
tion of the debt shall be brought against the company
within one year after it shall become due.

(a) PROMISSORY NOTE MADE AND GIVEN BY CORPORATION
TO ITS CREDITOR FOR A DEBT OWING HIM; EFFECT OF
ON RIGHT AND LIABILITY OF STOCKHOLDER.

1. So long as the debt for which the note was
given *remains unextinguished*, the liability of the
stockholders is in respect thereof only; conse-
quently, to hold stockholders, suit must be brought
against the company within one year *after that*
debt became due.

1. EXTINGUISHMENT; WHAT DOES NOT OPERATE
AS WITHIN THE PURVIEW OF THE STATUTE.

(a) Corporation's *own promissory note* in
hands of its creditor does not.

THIS ALTHOUGH
the creditor may have procured the
note to be discounted and had taken it
up on its protest.

(b) *Judgment*. One obtained upon the
debt, or one obtained by the creditor
upon the corporation's own note given
him for the debt, does not.

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

Decided January 14, 1878.

Appeal from a judgment in favor of the plaintiff at
a trial before the court without a jury.

Statement of the Case.

The defendant is sued to enforce a liability against him, as a stockholder of the Hudson River Iron Company, for a debt owing by the company. The company omitted to file a certificate of the payment in of its capital stock, as required by statute.

It appeared that the original debt was contracted in July, 1872, for iron sold by the plaintiff to the company, and that a note for \$634.33 was given for it, payable in five months, which the plaintiff procured to be discounted. That at maturity, the company gave a new note for \$645.19, dated December 4, 1874, payable in three months, which the plaintiff procured to be discounted, and with the proceeds took up and paid the prior note, which was thereupon canceled and surrendered.

Before the maturity of this note, on March 4, 1875, the company gave a new note for \$645.79, payable three months after date, which was used as before, and the former note canceled and surrendered.

Again, on June 5, 1875, a new note for \$657.69, dated that day, and payable in three months, was given, which was also used as before, and the former note canceled and surrendered.

Suit was brought on this last note for \$657.69, March 17, 1876, and judgment obtained against the company in March, 1876, and upon the return of the execution wholly unsatisfied, this action was commenced in April, 1876.

The cause was tried before Judge SEDGWICK, without a jury, who decided in favor of plaintiff. Upon his findings of fact and law, judgment was entered against defendant in favor of plaintiff, from which defendant appealed to the general term.

Judge SEDGWICK, upon deciding the case, delivered the following opinion.

SEDGWICK, J. — If there were not authority to

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guide me, I would take the following view of this case.

Unless the original indebtedness was extinguished when the amount of the first note was paid to the bank out of the proceeds of the discount of the next note, the defendant is not liable.

Upon the original indebtedness being secured to be paid by the first promissory note, the contract was in effect that the first note was a security, out of which the plaintiff was to be paid.

If he sold the security without becoming liable as indorser, the proceeds would be applicable to the original indebtedness, and would pay it. But if he indorsed and transferred it, and on maturity the original debtor failed to pay, and he had to take it up, although he had once received money on the note, he could sue upon the original indebtedness by returning the note he had taken up. If, however, instead of suing while he held the note, the original debtor, by his consent, instead of paying, gave a new note to the creditor, there is room, I think, to believe that, although that would pay the first note, it would not pay the original indebtedness, unless the creditor obtained money on it, without becoming liable upon it. That is, the original indebtedness would remain unpaid through all successive notes, until the creditor ceased to be liable thereon.

I do not see that the case is altered by the first note being taken up with money raised on a second note, if the creditor be liable on such second note. The money is raised on his credit as much as upon the credit of the debtor.

The money so raised is not the money of the debtor. He has not such an interest in it that a use of it satisfies his obligation that the creditor shall obtain from the first note the money to pay the original indebtedness.

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This, however, is mere speculation ; for as I read *Fisher v. Marvin* (47 *Barb.* 161), it is an authority that controls. The learned counsel for defendant supposes that in that case the first note was given for the purpose of raising money thereon. If that be so, still the person who advanced the money could have an action for it, although a note were given, provided it was returned to the original debtor on the trial.

There should be judgment for plaintiff.

Marsh & Wallis, attorneys, and *Wm. F. Shepard*, of counsel, for appellant, among other things, urged :—
I. This case is directly within *Parrott v. Colby* (6 *Hun.* 55).

II. *Fisher v. Marvin* was not well decided. At any rate, it is not a binding authority on this court, if its reasoning is not approved. It was made by a divided court—two judges for reversal, one for affirmance—the judges thus standing two and two. The opinion is given without much argument or reasoning—a sort of *ipse dixit*. It certainly seems a novel doctrine, that when a series of notes is made and delivered between the same parties, each latter one in renewal or payment of the preceding, and the form of a discount is gone through with, every new note constitutes a new and independent indebtedness, shutting off all defenses that might exist to the prior notes. The chief argument of the court in that case seems to be that on the substitution of the new note, the former note is canceled, and no action can be maintained on that. Of course not ; because the new note is the renewal and extension of payment. The question as to whether an action could be maintained on the original indebtedness, is one that the court does not consider.

Wm. M. Goodrich, attorney, and of counsel, for respondent, urged :—I. The debt on which the plaintiff

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obtained the judgment on which he bases the present action accrued within a year before the commencement of that action. The last note, which is the debt referred to, was an entirely new and distinct obligation, the consideration for which was the promise of the plaintiff that with the proceeds realized from its sale, he would take up and pay a former note, held by a bank, on which the Hudson Company were liable as makers, and which was then about to become due. This is a perfectly valid consideration (*Brown v. Burrall*, 31 *N. Y.* 114). This doctrine is clearly held in the case of *Fisher v. Marvin* (47 *Barb.* 159). The court, in giving its opinion, clearly distinguishes between the renewal of a note and the payment of a note by the proceeds of a new one. The payment of an old note by the proceeds of the discount of a new note cancels and extinguishes the old note (*Bank of Salina v. Babcock*, 21 *Wend.* 501; *Bank of Sandusky v. Scoville*, 24 *Id.* 115; *Pratt v. Foote*, 9 *N. Y.* 463).

II. The defendant also claims that the original *debt* for iron sold has never been extinguished—that hence the action upon the present note is barred. This, however, cannot be true. The original debt was incorporated into the first note, and was paid and discharged when this first note was absolutely paid and canceled, and all remedy on it gone.

III. Nor does it alter the case, that the plaintiff was an indorser upon this last note, as well as upon all the previous ones. The money raised upon this note was raised at least in part upon the faith of the promise of the Hudson Iron Co. to pay the note at maturity. The fact that the bank chose to further secure itself against loss by securing an indorser thereon, does not affect the truth of either of the following propositions: 1st. That the Hudson Company became primarily liable to pay the note to the bank discounting it, and that a new relation of debtor and creditor was created by novation.

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Decided at the Court, by CURTIS, Ch. J.

The bank had they seen fit so to do, could have released the plaintiff as indorser on this note, and their sole remedy against the Hudson River Bank, failing there, against the stockholders. The defendant's counsel has cited the case of *Parrott v. Colby* (6 *Hun*, 55), but that is an entirely different case. In that case, the debt matured March 1, 1868, and on January 8, 1868, an agreement was made that the debt was reduced to \$25,000, of which \$15,000 was paid in cash, and for \$10,000 of which a new note was given payable in one year. The note was not paid, and a suit was brought on that note. But in this case, a note was given for the original debt, payable in five months. When that note was due it was paid, and the note canceled and surrendered. The payment extinguished the original debt and all claims thereon.

But the bank being a holder for value and in possession of the last note, the plaintiff, being compelled to pay the same as surety, is subrogated to the position of the bank, and has its rights and remedies against the maker (*Hayes v. Ward*, 4 *Johns. Ch.* 122; *Parrott v. Colby* on *B.* 162).

THE COURT.—CURTIS, Ch. J.—The facts are confessed, and the case presents a single question of law. The defendant is liable in this action if suit was brought against the company within one year after the debt became due by the company (3 *R. S. Edm.* § 24).

The question raised here is in respect to the time when the debt of the company by law became due.

It is apparent from the facts in the case that the question is to be asked here, that was asked in *Parrott v. Colby* to an analogous state of facts by the learned judge rendering the opinion of the general term of the supreme court in *Parrott v. Colby* (6 *Hun*; 57).

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“Which was the indebtedness of the company to which the liability of the . . . stockholder attached,—the note, or the debt for which . . . the note was given?” The question was there answered, by holding that the giving of the note did not merge or extinguish the original indebtedness, but only operated to extend the time of payment, and that if the corporation was not sued within a year from the time the original debt became due, the liability of the stockholder ceased, and that it could not be renewed or extended, by any renewal or extension of the indebtedness, which the creditor might make with the corporation.

That the taking of the debtor's note does not merge or extinguish the demand for which it was taken, is sustained by a series of decisions in this State, which are cited in the opinion in *Parrott v. Colby* (*Tobey v. Barber*, 5 *Johns.* 68 ; *Gregory v. Thomas*, 20 *Wend.* 17 ; *Cole v. Sackett*, 1 *Hill*, 516 ; *Waydell v. Luer*, 5 *Id.* 448).

The general manufacturing law of this State has furnished so many pitfalls for inexperienced or unwary stockholders, and has operated so disadvantageously, in forcing capital out of the State, to be employed where these dangers do not exist, that courts may well hesitate before giving it such an interpretation as places the stockholder in a position where no lapse of time can protect him from liability, if the corporation and the creditor chose to change the original debt on which liability has lapsed into a note to be afterwards put in judgment against the corporation.

The respondent relies upon *Fisher v. Marvin* (47 *Barb.* 161), to sustain the decision appealed from. It appears from the opinion of the learned judge who rendered the decision now under review, that his views were similar to those presented in the recent case of

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Parrott v. Colby (*supra*), to which his attention was not called, but that he felt constrained to regard Fisher v. Marvin as a controlling authority. But this latter case, which was decided by a divided court, may now be considered as overruled by Parrott v. Colby, where the question received a careful consideration, and was determined by an undivided court.

The judgment appealed from should be reversed ; and as the facts are all conceded, judgment should be rendered in favor of the appellant dismissing the complaint.

SANFORD and FREEDMAN, JJ., concurred.

ALBERT G. WOODRUFF, ET AL., PLAINTIFFS AND
RESPONDENTS, v. SAMUEL A. BEEKMAN, DE-
FENDANT AND APPELLANT.

I. MAXIM.

1. *Damnum absque injuria*.

(a) INJURIES NECESSARILY RESULTING FROM DOING AN AUTHORIZED ACT, FALL WITHIN THE MAXIM.

1. W gave B a *license to open* apertures through the floors and ceilings of his (W's) store. W's goods were damaged by the dust and debris arising from the opening of the apertures. There was a conflict of testimony as to whether there were injuries to the goods other than such as would necessarily result from the licensed acts of B.

Held

1. That B was not liable for such damages as necessarily resulted from the doing of the licensed act.
2. That B was liable for such damages as did not so result.

AND AS A RESULT HELD,

3. That a charge "that if B had a license, and went into

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the premises by permission of W, but was guilty of depreciating the value of W's goods, he is still liable for the *whole* damage he has done," was erroneous.

II. IMPLICATION FROM EXPRESS AUTHORITY.

1. An express authority carries with it by implication an *authority to do such damage and injury* as necessarily results from the performance of the act authorized in express terms.

III. TRIAL, CONDUCT OF.—APPEAL.

1. *Charge to disregard all that counsel has said of irrelevant matter.*

(a) CASE; WHAT NECESSARY TO CONTAIN TO PRESENT AN EXCEPTION THERETO FOR REVIEW.

1. Should either show that the party claiming to be aggrieved called the attention of the court specifically to the irrelevant matters that had been spoken of by counsel, or should contain the alleged irrelevant matter.

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

Decided January 14, 1878

Appeal from a judgment in favor of plaintiffs for \$1,781.

Larned & Warren, attorneys, and *Ira D. Warren*, of counsel, for appellant, urged :—I. The court charged the jury : " You will disregard all that has been said by counsel of irrelevant matter, and try and do justice between those parties."

In the case of *Garrison v. Wilcoxson* (11 Geo. 154), the court charged the jury that, in determining the question, they were not "*to look to the argument of counsel*;" the judgment was reversed, and the court said—"In a very significant sense they must look to the argument of counsel. Parties have a right to appear by counsel, and it is the privilege of counsel to address the jury on the facts. If the jury are to disregard the arguments of counsel altogether, if they are to shut their ears to their illustrations, comments, and reasonings, how unmeaning, indeed how absurd,

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is the appearance of counsel, &c. It is the duty of the jury to listen, to be informed, but not to obey."

If it is correct for the court to instruct the jury to disregard and treat as "irrelevant matter" all that counsel has said, of course counsel waste a vast amount of labor for themselves, impose upon the court, and are general nuisances.

We submit that such a charge is erroneous.

II. The learned judge instructed the jury "that, as a question of law, if the defendant had the license, and went into these premises by permission of the plaintiffs, but was guilty of depreciating the value of the plaintiffs' goods, he is still liable for the *whole* damage he has done."

This charge we submit was not quite accurate: as, assuming that the defendant had plaintiffs' consent to do the work, it made the defendant liable for the *whole* damage done, whether it necessarily resulted from doing the work or not. If he had a license *from plaintiffs* to enter and do the work, however negligently he may have done it, such negligence did not make him a trespasser *ab initio* (Allen v. Crofoot, 5 Wend. 506; Dumont v. Smith, 4 Denio, 320).

Nelson Smith & Leavitt, attorneys, and John Brooks Leavitt, of counsel, for respondent, submitted two elaborate briefs. They conceded that one acting under permission was not liable for a damage done to the property of the permissor, which was the necessary result of doing the permitted act, and which was or ought to have been in the permissor's contemplation as a necessary result; but claimed that the damage was not—or, what is the same thing on appeal—was not proved by defendant to be the necessary result of the licensed act. Therefore, they claimed that the charge, as applicable to the facts of the case, was correct.

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They submitted no points as to the charge to disregard remarks of counsel of irrelevant matter.

BY THE COURT.—CURTIS, Ch. J.—The action is to recover damages for injury alleged to have been caused by the defendant to the plaintiffs' stock of goods, by cutting large holes through the floors and ceilings of plaintiffs' store. The defendant pleaded in answer, that he opened the apertures under a license from the plaintiffs, and as he lawfully might thereunder, and without injury to the business or property of the plaintiffs.

The evidence at the trial, as to whether a license was granted to the defendant, and as to the nature of the injuries, was conflicting.

The defendant excepted to this portion of the judge's charge to the jury: "You will disregard all that has been said by counsel of irrelevant matter, and try and do justice between these parties." If counsel present and discuss irrelevant matter in summing up to a jury, it may be the duty of a judge to warn and instruct them to disregard it. If the defendant considered that he was prejudiced by this instruction of the judge, he should have called the attention of the court specifically to the irrelevant matter, that had been spoken of by counsel, or caused the same to appear in the case, so that the appellate court could have had some means of knowing whether this instruction complained of by the defendant afforded any just ground for an exception. In the form in which it is presented by the case, this exception is not tenable (*Ayrault v. Pacific Bank*, 47 N. Y. 576).

The jury were instructed, "that, as a question of law, if the defendant had the license, and went into these premises by permission of the plaintiffs, but was guilty of depreciating the value of the plaintiffs' goods, he is still liable for the *whole* damage he has

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done." This part of the charge was excepted to by the defendant.

If the jury found that there was no license given to the defendant to open the apertures, the remaining question in the case became one simply of the assessment of the plaintiffs' damages, if any. But if they found that there was a license, then the question arose for their consideration, whether there were injuries to the property of the plaintiffs, other than such as would necessarily result from the licensed acts of the defendant.

If the plaintiffs' goods were necessarily damaged by the acts of the defendant, which the plaintiffs had seen fit to permit him to perform, no action can be maintained by the plaintiffs to recover for such damages. The loss to the plaintiffs is, in such cases, the necessary sequence to the permission given by them. But for all injury to the plaintiffs' goods beyond such as was necessary in a careful and prudent opening of the apertures, if the jury found there was a license, the plaintiffs are entitled to recover. On this subject the evidence is conflicting. The defendant testified that after the boards were removed, the lathing was sawed off, and that the portion sawed off and the plaster, as it came down, was received by his men, who stood on boxes below, thus making very much less dust, and avoiding bruising the floor. The plaintiffs, on the contrary, testified to an accumulation of dust and debris in his store and upon his goods, entirely inconsistent with the careful and prudent mode of proceeding stated by the defendant. It is apparent that the presence of some dust and some debris in the plaintiff's store was a necessary result of opening these apertures in accordance with the permission claimed to have been given.

In this condition of evidence there was a question of fact, as to whether any unnecessary damage was

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done by the defendant acting under the license. If the jury found that there was not, while the defendant was so acting, there was an end of the plaintiff's case. It is therefore possible that in view of this, the defendant may have been prejudiced by the instruction of the court to the jury, that if the defendant went into the premises by permission of the plaintiff, but was guilty of depreciating the value of his goods, he was liable for the whole damage he had done. The damage for which the defendant was liable, was in reality, that part of it, if any, which was unauthorized by the license and was tortious. The exception to this portion of the charge should be sustained, unless the defendant by his course at the trial conceded that the whole damage to the plaintiffs' goods was not a necessary result of his acts. But no such concession was made by the defendant. He testified to having the work done in such a way as to very much diminish the dust, but the subtle and pernicious action of lime dust upon goods of the character of the plaintiffs, even when very moderately diffused in a store, is shown by the proofs (*Green v. White*, 37 N. Y. 405).

There are one or two other exceptions, to which the attention of the court was directed, but they are not of a character to call for a new trial, but the exception to the instruction that the defendant, if he had the license, was liable for the whole damage, appears to be such as entitles the defendant to a new trial.

The judgment appealed from should be reversed, and a new trial granted, with costs to the defendant to abide the event.

SANDFORD and FREEDMAN, JJ., concurred.

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SAMUEL T. FREEMAN, PLAINTIFF AND RESPONDENT, v. JOHN L. LAWRENCE, ET AL., EXECUTORS, ETC., OF WILLIAM T. GARNER, DECEASED, DEFENDANTS AND APPELLANTS.

I. PARTY TO ACTION.

1. *Examination of against parties claiming under a deceased person, under section 899 of the Code of Procedure.*

1. QUESTION NOT ALLOWED.

- (a) About the time you were introduced to Mr. Garner (the deceased), did you commence any action *for him*? This is inadmissible as calling for evidence of employment of the witness by the deceased.

II. EVIDENCE.

1. *Experts, opinion of as to value of services.*

- (a) CANNOT BE BASED ON WHAT.

1. Not on the *testimony* of a witness or witnesses as to what services were rendered.

- (b) MAY BE BASED ON WHAT.

1. On *facts* stated by witnesses, and claimed by counsel to have been proved by their testimony.

- (a) QUESTIONS TO EXPERT, WHAT MAY BE PUT.

1. *Hypothetical* ones based on such facts may be put.

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

Decided January 14, 1878.

Appeal from a judgment in plaintiff's favor for \$2,248.15, entered upon a verdict, and also from an order denying a motion for a new trial.

H. A. Nelson, attorney, and of counsel, for appellants, on the points noticed by the court, urged:—I. The following question, propounded to plaintiff in his own behalf: “About the time you were introduced to Mr. Garner, did you commence any action *for him*?” was

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improperly allowed (*Strong v. Dean*, 55 *Barb.* 337; *Stanley v. Whitney*, 47 *Id.* 586; 48 *Id.* 417; *Van Alstyne v. Van Alstyne*, 28 *N. Y.* 379).

II. The following question, propounded to Rufus L. Scott, a lawyer: "Will you state to the court and jury, what you think was a reasonable charge for the services rendered by Mr. Freeman, as testified to by him, as attorney?" was improperly allowed (*Reynolds v. Robinson*, 64 *N. Y.* 595; *People v. Lake*, 12 *Id.* 358; *Carpenter v. Blake*, 2 *Lans.* 206).

Robert Murray, attorney, and of counsel, for respondent, urged:—I. The question put to plaintiff, "About the time you were introduced to Mr. Garner, did you commence any action for him?" was properly allowed (*Hildebrandt v. Crawford*, 6 *Lans.* 502; *Simmons v. Sisson*, 26 *N. Y.* 264; *Lobdell v. Lobdell*, 36 *Id.* 327; *Cary v. White*, 59 *Id.* 336). If any error was committed in the admission of any part of the plaintiff's testimony, it could not have done any possible injury to the defendants, and should therefore be disregarded. The plaintiff's case was proven, beyond question, by other evidence. The rule seems to be settled that new trials will not be granted on the ground of the admission of improper evidence, when "the court is satisfied that no injustice has been done, and that the verdict would have been the same with or without such evidence" (*Forrest v. Forrest*, 25 *N. Y.* 510; *Clark v. Brooks*, 2 *Daly*, 159; *Rowland v. Hegeman*, 59 *N. Y.* 643).

BY THE COURT.—CURTIS, Ch. J.—The action is brought to recover for legal services rendered the deceased in his lifetime. No question was raised on the trial as to the rendering of the services, and no exceptions were taken to the charge to the jury.

The only points raised for consideration on this appeal, are the defendants' exceptions to the rulings

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of the court upon the reception of testimony, and also upon the claim of the defendants, that the damages are excessive.

The plaintiff, when testifying at the trial, was asked this question on his own behalf: "Question. About the time you were introduced to Mr. Garner, did you commence any action for him?" To which defendants objected that the witness was incompetent to testify on the subject, being a party, and the other party being dead; the objection was overruled, and defendants excepted. The answer was "I did." The appellants claim that this exception is well taken, and that the reception of this evidence was in conflict with the provisions of section 399 of the Code; that it was in effect allowing the plaintiff to testify on his own behalf in regard to a personal transaction or communication between the witness and the deceased, or that at least, the form of the question was such that taken in connection with the answer it called for, it must have been so understood by the jury. The employment of the plaintiff by the deceased was one of the issues raised by the pleadings.

The protection sought to be afforded to the estates of deceased persons, by this section of the Code, has not been viewed with disfavor by the courts, and has led to perhaps a stringent interpretation and application of its provisions, but yet not more so than what is deemed requisite in the due administration of justice. Considered in respect to the recent decisions in *Brague v. Lord*,* court of appeals, and *Ross v. Harden*,† at the general term of this court, I am led to the opinion, that the objection to this question in the form that it was asked, should have been sustained, and that the appellants' exception was well taken.

The remaining exception of the appellants to which

* 2 *Abb. New Cas.* 1.† 42 *N. Y. Superior Ct. Rep.* 427.

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the attention of the court was chiefly called at the argument was as follows. On the trial, Rufus L. Scott was examined as a witness on behalf of the plaintiff. He testified, "I am a lawyer; have been about fifteen years; have heard the evidence of Mr. Freeman just given in this case." Question by plaintiff: "Will you state to the court and jury, what you think was a reasonable charge for the services rendered by him, as testified to by him, as attorney?" This was objected to by the defendants, "as irrelevant and improper, and as improperly calling for the opinion of the witness, and because the witness has no right to judge in reference to the testimony that is in the case." The objections were overruled, and defendants excepted.

The value of the professional services of the plaintiff was a question of fact to be decided by the jury upon the testimony. A witness who without any previous knowledge of the services after simply hearing the plaintiff's testimony in the court at the trial on the subject, is not competent to testify as to their value, if objected to. He may be asked hypothetical questions, based upon facts, stated by witnesses, and claimed by counsel to have been proved by their testimony. The attention of the witness is thus called to a state of facts, and he answers without any reference as to whether they have been proved, or are true or not. His field is in this way limited, and that of the jury is not encroached upon.

This is the doctrine held in the case of *Reynolds v. Robinson* (64 N. Y. 589), where in an analogous case the value of professional services was allowed, against objection, to be testified to by a witness, who had heard the testimony of his professional brothers at the trial, and on this ground the judgment of the general term of the supreme court, affirming a judgment en-

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tered upon the report of a referee, was reversed and a new trial ordered.

It is pressed by the respondent, that even if there were errors in these rulings of the court, as to the admission of the testimony, that it could have done no possible injury to the appellants, and should therefore be disregarded. It may be that the jury were not influenced by this testimony, which should have been excluded, but a careful consideration of the case does not enable me to come to the conclusion that this was certainly so, and it is preferable to follow the action of the courts in the cases cited.

There were other exceptions in the case to the admission of testimony, but none that called for the granting of a new trial.

The judgment appealed from should be reversed, and a new trial granted, with costs to the defendant to abide the event of the new trial granted.

SANFORD and FREEDMAN, JJ., concurred.

THE SIXTH AVENUE RAILWAY COMPANY IN
THE CITY OF NEW YORK, PLAINTIFF AND
RESPONDENT, v. THE GILBERT ELEVATED
RAILROAD COMPANY, DEFENDANT AND AP-
PELLANT.*

I. APPEAL.

1. *Review on, limit of.*

(a) Although when the bases of the judgment in the court below are erroneous; and the case had not then been there considered

* The case at special term is reported in 41 *N. Y. Superior Court*, p. 489.

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in all its aspects, the appellate court is for these reasons justified in reversing the judgment and ordering a new trial ; *yet it may and sometimes will*, at the request of respondent's counsel, inquire whether the judgment can be sustained on propositions contended for by said counsel, other than those on which the judgment below proceeded.

II. FRANCHISE TO USE A PUBLIC HIGHWAY FOR A PARTICULAR PURPOSE.

1. *Act or charter granting, construction of.*

(a) Authorizes the appropriation of *so much only* as is requisite to carry into effect the design for which the power of appropriation was given, and *this privilege is exhausted* by the appropriation in fact of so much of the roadway as the exigences of such design actually require.

III. CONSTITUTIONAL LAW.

Private property.

TAKING FOR PUBLIC USE, WHAT IS NOT.

Impairing its value by the proximity of other property legitimately employed for the public use and benefit under the sanction and by the authority of a legislative enactment, *cannot be said to be taking private property* for public use in the exercise of the right of eminent domain.

E. g. The authorization of a railway parallel with, and competitive of, one already established.

Authorizing a corporation to use for the public use and benefit such parts of a highway as have not been already appropriated by a corporation, under authority conferred on it, as actually required by it, the use authorized to be made by the former corporation being such as not to interfere materially with the use by the latter of the parts so appropriated by it, *is not the taking of private property of the latter corporation.*

See FRANCHISE, *supra*.

Authorizing a corporation to use for the purpose of a railroad for the public use and benefit *streets opened in the city of New York* under the act of 1813, or parts thereof, *does not take away any property or right of property of the abutting owners in the streets.*

See NEW YORK CITY, *infra*.

IV. NUISANCE, PUBLIC.

1. *The mere occupation* by defendant's road of certain streets and avenues in the manner authorized by law, *is not a public nuisance.*

V. NEW YORK CITY.

1. *Land taken for streets under act of 1813.*

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(a) ABUTTING OWNERS, RIGHTS OF THEREIN.

1. Have no exclusive right or interest therein and *no easement* in the nature of a right of way over the same, other than that which is held and enjoyed by the public at large.

1. *Trusts created by act of 1818.* Abutting owners, as such, have no special and peculiar interest in the enforcement thereof.

VI. EASEMENT OF ABUTTING OWNERS IN THE CITY OF NEW YORK.

See NEW YORK CITY, *supra*.

VII. RAPID TRANSIT ACT.

1. *Fourth section, effect of prohibition in.*

(a) The implied prohibition against crossing Broadway *does not affect* the right of a company having authority under the act to proceed with respect to any part or portion of its road *not directly affected* by it.

1. In the case at bar, the only portions of defendant's route affected by the prohibition, are those included within the intersecting lines of Broadway.

VIII. INJUNCTION.

1. In the case at bar the court, applying the above principles, held there was *no ground* to sustain the suit.

1. TAKING OF PRIVATE PROPERTY. No private property of the plaintiff having been attempted to be taken or interfered with by the acts complained, it could not be sustained on the ground of restraining the taking private property for public use until due compensation had been made or provided for.

2. PUBLIC NUISANCE. Defendant's structure, not being a public nuisance, it could not be maintained on the ground of restraining a public nuisance.

1. *Special damage to plaintiff.* The fact that defendant's proposed railroad would cause special damage and injury to plaintiff, *is in this aspect immaterial.*

3. WANT OF AUTHORITY. As the want of authority to cross Broadway only affected those portions of defendant's route which are included within the intersecting lines of Broadway, and as in reference to these portions the elements of interest and irreparable injury were wanting, the suit could not be maintained on this ground.

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

Decided January 14, 1878.

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Appeal by defendant from a judgment rendered at special term, June 22, 1877, after a trial of issues of fact by the court without a jury.

The judgment appealed from enjoins and restrains the defendant from building upon the Sixth avenue, (in the city of New York), from Amity street to Fifty-ninth street, an elevated railway, in accordance with plans prescribed or approved by commissioners appointed under the "rapid transit act" (*Laws of 1875*, ch. 606).

Upon the trial it appeared, among other things, that the plaintiff is a railroad corporation, created and organized under the general act of 1850; and that, as such corporation, for more than twenty years, it has owned and operated a double-track horse railroad through Sixth avenue, from Amity street to the Central Park at West Fifty-ninth street; and, also, that during the same period, it has owned in fee certain lots of ground, with buildings and improvements thereon, fronting on Sixth avenue, and described in the deeds whereby they were conveyed to the plaintiff, as "bounded westerly in front by Sixth avenue." For the purposes of the action, it was admitted, by a stipulation between the parties, that the portion of Sixth avenue between Amity street and the Central Park, at Fifty-ninth Street, was opened by proceedings had under and pursuant to the act of April 9, 1813 (*Laws of 1813*, ch. 86), and the laws amendatory thereof.

It further appeared, on the trial, that the defendant was incorporated by a special act, passed for that purpose, June 17, 1872, and was thereby authorized to construct an elevated railway through such streets and avenues, as should be designated by certain commissioners. Such commissioners designated a route which extends through the Sixth avenue, from Amity

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street to Fifty-ninth street. On June 18, 1875 (*Laws of 1875*, ch. 606), the legislature passed an act, since generally known as the "Rapid Transit Act," which, upon certain terms and conditions therein specified, authorizes the construction of steam elevated railroads in cities, over, under, through or across the streets, avenues, places or lands therein ("except Broadway and Fifth avenue below Fifty-ninth street, and Fourth avenue above Forty-second street, in the city of New York," and certain other excepted places), upon consent of certain property owners and local authorities, or, in case such consent cannot be obtained, upon a decision by commissioners appointed by the supreme court, to the effect that such railroad ought to be constructed. Corporations formed under that act are thereby empowered to construct and operate railways upon the routes decided upon, as therein provided, and, in all cases, the use of streets, avenues, places and lands, and the right of way through the same for the purpose of such railways, is thereby declared to be a public use, consistent with the uses for which such streets, avenues, &c., are publicly held. The thirty-sixth section of the act relates especially to the construction of such railways as are thus authorized to be built, over routes coincident with horse railway tracks occupying the surface of the street, and confers certain powers and privileges incident or necessary to such construction; and, thereupon, also confers upon *existing corporations, formed for the purpose provided by the act*, and whose routes, according to their charters, are coincident with routes determined upon by commissioners pursuant to its provisions, like power *to construct and operate such railways, as a corporation specially formed under the act*, upon fulfillment of the requirements and conditions imposed pursuant thereto. Under the provisions of this act, an elevated railway route, coincident with that of the defendant,

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as prescribed by its charter, was fixed and laid out; and thereupon the defendant, claiming authority so to do, under and by virtue of the legislation and proceedings above mentioned, undertook to construct an elevated railway through the Sixth avenue, between Amity and Fifty-ninth streets, and proceeded therewith, until enjoined by the order, and, finally by the judgment of this court.

Upon the trial, at special term, it was claimed and insisted by the plaintiff, that the Rapid Transit Act of 1875 (and especially section 36 thereof), upon which the defendant relied as constituting its authority to build the road upon the plan prescribed by the commissioners appointed thereunder, was invalid, as in conflict with the State constitution. The judge before whom the trial was held, held that the thirty-sixth section of the Rapid Transit Act was unconstitutional and void; that the defendant had no authority, in law, to construct its proposed railroad, either by virtue of its charter or the provisions of that act; and, accordingly, that the plaintiff was entitled to a perpetual injunction restraining defendant from building such railway.

Judgment was entered accordingly, and defendant now appeals.

The arguments of counsel for the respective parties were very elaborate; the abbreviation of them here presented gives the substance of the points raised.

Porter, Lowrey, Soren & Stone, attorneys, *Grosvenor P. Lowrey, Charles Francis Stone*, and *John K. Porter*, of counsel, for appellant, urged in substance:—I. *As to the limits under which the court should review the special term judgment.* 1. The duty of the appellate branch of the court would seem to be limited to a review of the bases upon which

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that judgment rests. Such a review having already been had—virtually—in the court of appeals, resulting in a decision that the bases of the special term judgments are erroneous, it would seem that that judgment should be at once reversed and a new trial ordered (*Wisser v. O'Brien*, 3 *Jones & Spencer*, 149, 152; *Munro v. Potter*, 34 *Barb.* 361; *Mills v. Van Voorhees*, 20 *N. Y.* 412, 423).

II. *As to the pretended franchise.* This is claimed under resolutions of the common council of the city of New York, and an act of the legislature confirming all grants previously made to street railroads upon the terms and conditions of the original grants (*Laws* 1854, p. 323). No exclusive privilege to use the surface of Sixth avenue, or the circumambient spaces of the air can be found in these resolutions or contracts; and no such exclusive privilege or promise of a privilege is, as against the general public interest and in diminution of the general control of the State over public streets and highways, to be implied (*Thompson v. N. Y. & H. R. R. Co.*, 3 *Sandf. Ch.* 625).

III. *As to the obligation of contracts generally.* It may be said in general that "It is competent for the legislature, after granting a franchise to one person or corporation, which affects the rights of the public, to grant a similar franchise to another person or corporation, the use of which shall impair or even destroy the value of the first franchise, although the right so to do may not be reserved in the first grant, unless the right to do so is expressly prohibited by the first grant" (*Charles River Bridge Co. v. Warren Bridge Co.*, 11 *Peters*, 420; *Auburn, &c. Co. v. Douglas*, 9 *N. Y.* 444; *Rennselaer, &c. R. R. v. Davis*, 43 *Id.* 137; *Mohawk Bridge Co. v. Utica, &c. R. R.*, 6 *Paige*, 554; *Ft. Plain Bridge v. Smith*, 30 *N. Y.* 44).

Upon this point, therefore, we contend:

1. That there is no obligation of contract, binding

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on the city or State, to permit the Sixth Avenue Railroad Company to continue its railroad or run its cars, and much less to exclude others.

2. That such an obligation, if existing, would not be impaired by legislation permitting others to carry on in the same street the business proposed by us, however injurious might be the competition. It is difficult to conceive what can be said in support of the idea, that the building of the defendant's road brings upon the plaintiff the injury contemplated by section 10 of article 1 of the constitution of the United States.

IV. *As to the easement claimed by plaintiff.* 1st. The history of the law affecting streets in this city, informs us that, under the Dutch law, the fee of all roads and streets belonged to the sovereign State; and that all such title in the State passed by conquest to the crown of Great Britain, and, after the American Revolution, to the State of New York, by which State it has, by the acts above-mentioned, been granted to the city (*Dunham v. Williams*, 37 *N. Y.* 251).

The provincial legislature provided a scheme of legislation for the laying out of streets, by which it was arranged that compensation was to be given to the owners of land over which roads or streets were opened. In the case of roads in the country, only an easement was deemed to be taken, and the compensation paid was such damages as were appropriate for the use of the land assessed. But in the city of New York the municipal government, in laying out streets, were required to give reasonable satisfaction, not for the use of the land, but for all such land as should be taken and employed, and the satisfaction was to be for the complete respective interests and estates of the owners in such land (1 *Smith & Liv. Laws*, p. 8; *Laws of 1691*, ch. 18; *Hoffman's Treatise on Estates and Rights of Corporations*, vol. 1, p. 199). Various acts

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of the provincial and State legislatures were superseded by the acts of 1807 and 1813.

The title to streets in this city laid out under those acts is completely in the city (*Schuchart v. The Mayor, &c.*, 53 *N. Y.* 202; *The People v. Kerr*, 27 *Id.* 188; *Kellinger v. Forty-second Street R. R. Co.*, 50 *Id.* 206; *Matter of Ninth Avenue*, 47 *Id.* 732; 2 *Hill*, 466; 3 *Barb.* 459; 6 *Id.* 313; 7 *Id.* 508; 6 *N. Y.* 522; 25 *Id.* 536; 43 *Id.* 414).

There can be no private easement appurtenant to abutting lots in the public easement, for that would establish a private right to the continuance of a public right, and would constitute a double right to the same easement—one right in the public, and one in the private person; nor can the possession of a right to participation in the general public easement entitle the holder to maintain a private action (*Anderson v. Rochester, &c. R. R.*, 9 *How. Pr.* 553; *Higby v. Camden & Amboy R. R.*, 19 *N. J. Eq.* 279; *Currier v. West Side R. R.*, 6 *Blatchf.* 495; *Wyman v. Mayor*, 11 *Wend.* 494).

The theory of the plaintiffs as to their easement in the street, whether for general passage or special access to their lots, is well treated in the *Jersey City R. R. v. Hoboken R. R.*, 5 *C. E. Green*, 70.

The power of the public authorities to affect the convenience of access to abutting lots is maintained in various cases (*N. Y. & Harlem R. R. v. Forty-second Street R. R.*, 26 *How. Pr.* 70, 71; *aff'd* 32 *Id.* 500; 50 *Barb.* 285; *Id.* 309; *Carver v. Paul*, 24 *Penn.* 207; *Godfrey v. City of Philadelphia*, 637; *Polack v. San Francisco Orphan Asylum*, 38 *Cal.* 490; *Fearing v. Irwin*, 55 *N. Y.* 486).

This is perhaps, however, the proper place in which to cite some authorities in refutation of the notion that there has arisen, from the proceedings by which lands in Sixth avenue have been appropriated and paid for,

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an implied covenant in favor of abutting owners. This notion seems to be, that by the payment of the assessment imposed upon them or their predecessors in the title for the benefit of the street opening, there has been created in such abutting owners a private interest in the street.

In the exercise by the State of the right of eminent domain and of its taxing power, the citizens' consent is ignored. Nothing depends upon that consent or the withholding of it, and no right arises from any declaration by the State, when it levies the tax or takes the property, of its then present intentions.

The court of last resort has decided that a local assessment of this nature is a tax, and that "the payment of taxes is a duty, and creates no *obligation* to repay otherwise than in the proper application of the tax" (People v. Mayor of Brooklyn, 4 *Comst.* 424).

2. The provision in the act of 1807, requiring the filing of a general map, which shall be final and conclusive, and enacting that after the streets around a block should be opened no public street should ever be made through the block, and similar provisions in other acts (*Laws* 1831, chap. 252) have never been considered unalterable provisions creating a private right (*Waddell v. Mayor*, 8 *Barb.* 97; *Wilson v. Mayor*, 1 *Den.* 595).

3. Even if there were any possibility of reverter, that interest is a nominal one merely, not entitling its holder to the intervention of equity (*Wetmore v. Story*, 22 *Barb.* 488). The value of a possibility of reverter is not assessable at more than one dollar, or at anything beyond a mere nominal sum (*In re Thirty-ninth Street*, 1 *Hill*, 194; *In re Thirty-second Street*, 19 *Wend.* 129).

The value of a similar interest in a much larger part of a dedicated street, which would have been worth \$7,000 if not burdened by the public use, was

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held to be correctly assessed at one dollar, in *Livingston v. Mayor, &c.*, 8 *Wend.* 35.

An injunction will not be granted where it would cause great injury to the defendants, and might be of serious detriment to the public, without corresponding value to the complainants (*Torrey v. C. & A. R. R.*, 18 *N. J. Eq.* 293; *Cross v. Mayor*, *Id.* 305, 313; *Higby v. C. & A. R. R.*, 19 *Id.* 276).

The erection proposed by us is auxiliary to the general public use; does not in any reasonable sense impair the convenience of any private person; and such obstructions, even if they do actually *obstruct*, are not to be enjoined where there is any doubt as to the law or the facts (*Barnes v. South Side R. R.*, 2 *Abb. N. S.* 415; *Att'y Gen'l v. L. B. R. R.*, 9 *C. E. Green*, 49; *Hodgkinson v. L. I. R. R.*, 4 *Edw.* 411; *Thompson v. R. R.*, 3 *Sandf. Ch.* 625).

V. *As to the trust supposed to exist under the act of 1813, § 107.* The notion that the land in public streets in this city is, under the terms of the act of 1813, impressed with a trust which can be availed of by plaintiffs to exclude the proposed use of Sixth avenue, is wholly without support in the language of the act, or in general public policy.

The phrases "for ever" and "in trust," in the act of 1813, do not constitute an irrepealable engagement between the State and the abutting lot owner. These words in the act of 1813 do not qualify the fee relinquished to the public, but the possession which is to be taken and held by the city after the fee has vested. They describe the municipal duty to the State, not the obligations of the State to the abutting owner. They do not imply an abdication of legislative power (*People v. Roper*, 35 *N. Y.* 636, 637; *Embury v. Conner*, 3 *Comst.* 511; 2 *R. S.* 6th ed. 526, § 20; *Worcester City v. Worcester*, 110 *Mass.* 353; *Wellington v. Petitioners*, 16 *Pick.* 88; *Casey v. Harned*, 5 *Iowa*, 14; *Matter of*

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Turfler, 44 *Barb.* 52; People v. Mayor of Brooklyn, 4 *N. Y.* 424; People v. Roper, 35 *Id.* 637; Brooklyn Park Commissioners v. Armstrong, 45 *Id.* 245; Smith v. City of Boston, 7 *Cush.* 254; Gould v. Hudson R. R. R., 6 *N. Y.* 522; Radcriff v. Mayor, 4 *Id.* 195; Wilson v. Mayor, 1 *Den.* 595; Lansing v. Smith, 8 *Cow.* 149; Garrison v. City of New York, 21 *Wall.* 203, 204).

VI. *The evidence as to obstruction and damages.* Plaintiff's claim has been stated thus:

"Our affirmation is that the owners of houses and lots fronting on a street in a city are deemed to suffer *peculiar* injury when the street is closed *anywhere*, so as to *obstruct* their means of communication with the public."

Not one adjudged case can be found where such a doctrine is announced. Many authorities deny the doctrine in express terms (Tate v. Ohio R., 7 *Ind.* 483, 484; Williams v. Beardsley, 2 *Car.* [*Ind.*] 596).

The learned judge at the trial excluded all evidence of diminution of value as immaterial. In this he followed, as he was bound, the settled doctrine of this court, in Dougherty v. Bunting (1 *Sandf.* 1), reaffirming Lansing v. Smith (8 *Cow.* 146), that where an *unauthorized* obstruction of a highway decreases the rental value, and the damage is common to a whole class, no one member of the class can sue.

VII. *Crossing Broadway.* The technical objection that there was *no coincidence* between the routes determined on by the Rapid Transit Act and that previously granted to the appellant, is without even colorable formation, and is set at rest by the opinion of CHURCH, Ch. J., in the court of appeals. It rests on an *exception* made in section 4 of the Rapid Transit Act, of certain streets in New York and Buffalo.

It will be observed that the word "across" is imported by construction into the *exception*, from the

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previous *enabling* clause ; and as the evident *object* of the exception was simply to prevent the building of steam railways *on the line* of those particular streets, we submit that by a fair construction the exception should be so limited.

The exception should not be held to apply to routes *on the continuous line of streets* crossed by Broadway, which so traverses the city *diagonally*, that it intersects most of the avenues.

But, in any view, there is no *prohibition* against selecting a route across Broadway. The exception is merely to a *grant of power*, and if the commission had actually *required* the companies to cross Broadway with steam engines, it would at most have been an *excess* of their power, which would be void to the extent of the excess, and would not affect the validity of the "*routes*" up to Broadway on either side.

But the objection is untenable in any aspect, for, as matter of fact, the commissioners *excluded* from the "*routes*" determined upon by them, *all the excepted streets*, including Broadway, and every part thereof.

This exclusion, however, did not prejudice the prior and unrestricted right of the Gilbert Company to cross Broadway.

The *coincidence* provided for in section 36 was not of the *entire* "*route or routes*" selected by the commissioners, with the entire route of any one existing company ; but the priority of right was reserved to any such company to the *extent of such coincidence*, and whether it was *on one or more routes*.

Evarts, Southmayde & Choate, attorneys, *Joseph H. Choate* and *George F. Comstock*, of counsel, for respondent, urged, in substance :—I. The legislature has no power to authorize a company to enter upon and appropriate a highway for purposes other than those to which it had originally been dedicated in pursuance

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of the highway acts, without first providing the just compensation therefor (Trustees of the Presbyterian Society in Waterloo v. Auburn & Rochester R. R. Co., 3 *Hill*, 567; Milhan v. Sharp, 27 *N. Y.* 611; Craig v. Rochester City & Brighton R. R. Co., 39 *Id.* 404; Mahon v. N. Y. Cent. R. R. Co., 24 *Id.* 658; Carpenter v. N. Y. Cent. R. R. Co., *Id.* 655; Wager v. Troy Union R. R. Co., 25 *Id.* 526; Bloodgood v. M. & H. R. R. Co., 18 *Wend.* 9).

II. The dominion of the legislature over the streets of the city of New York, under the act of 1813, is not absolute and unlimited. Its power over them has the same limit as the power over the highway in other parts of the States has under the above-cited cases.

The case of Heywood v. The Mayor (3 *Seld.* 214), shows the difference between land acquired for public use, over which the dominion of the legislature is absolute, and that acquired for street purposes, over which its dominion is necessarily limited to the perpetual maintenance of the street as a highway.

III. The use proposed to be made of the Sixth avenue by defendant is more inconsistent with its uses as a highway than were the uses to which the highways were proposed to be put in the above-cited cases.

As the evidence shows, it is proposed to plant in the road-bed double rows of columns, which, at the bases, including the fenders, are to be thirty inches in width, two of them opposite each other in the street, occupying together one-twelfth of the whole roadway in a street sixty feet wide, and constituting a complete exclusion of the public, and of the abutting owners, from so much of the road-bed, upon which, in many parts of the route, and probably in front of plaintiff's premises, are to be erected platforms and depot buildings and staircases, which are in practical effect indistinguishable from the erection of so many houses on the street in front of the plaintiff's property.

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IV. Upon justly considering the great multitude of cases in the courts of this and other States, decided upon the principle that for mere consequential damages the sufferer is not entitled to compensation, though occasioned by the exercise of the right of eminent domain, where no property is taken from him ; it will be found that there is nothing in them which militates at all against the rights which we now claim for the property owners.

The very gist of our claim here is that a substantial right of property is taken away by the blocking up of the street.

We venture to commend to the attention of the court the enlightened view of this subject taken by the English courts, in the most recent cases involving the construction of the *Lands Clauses Consolidation Act* (*Vide* Metropolitan Board of Works v. McCarthy, *L. R. 7 App. Cas.* 243; Becket v. West of London R. W. Co., 2 *B. & S.* 605).

The supreme court of the United States has also strongly intimated its opinion in favor of the view now presented (*Pumpelly v. Green Bay Company*, 13 *Wall.* 166). *Vide* also the following cases in Ohio, which emphatically support the rights for which we here contend: *Crawford v. Delaware*, 8 *Ohio St.* 459; *Cincinnati, &c. Ky. Co. v. Cumminsville*, 14 *Id.* 523; *Roberts v. Easton*, 19 *Id.* 78.

V. The authorities on this subject of the appropriation of corporate franchises, by virtue of the right of eminent domain, are numerous and harmonious. They establish that the only true rule of policy as well as of law is that a grant for one public purpose must yield to another more urgent and important, and this can be effected without any infringement on the constitutional rights of the owners of the franchises ; but, in such cases, suitable and adequate provision must be made by the legislature for the compensation of those whose

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franchise is injured or taken away. And it cannot be doubted that the section of the constitution of this State which we invoke makes ample provision.

On the general subject of the condemnation of corporate franchises, we cite the following authorities: *Cooley on Constitutional Limitations*, 526; *West River Bridge v. Dix*, 8 *How. U. S.* 507; *Richmond R. R. Co. v. La. R. R. Co.*, 13 *Id.* 81; *Central Bridge Corp. v. Lowell*, 4 *Gray*, 482; *Boston Water Power Co. v. Boston & W. R. R. Co.*, 23 *Pick.* 360; *Commonwealth v. Pittsburgh, &c. R. R. Co.*, 58 *Penn. St.* 50; *Commonwealth v. Penn. Canal Co.*, 66 *Id.* 41; *New Castle, &c. R. R. Co. v. Peru & Ind. R. R. Co.*, 3 *Ind.* 464; *Charles River Bridge v. Warren Bridge*, 11 *Pet.* 571.

It is impossible not to see that the proposed construction of the Gilbert road, and its operation by steam power over that of the plaintiff, will seriously impair, if not wholly destroy, its value.

The findings of the learned court below, on this head, are all that are needed to lead the judgment of the court to this conclusion.

The twelfth finding shows that the tracks of the plaintiff are to be wholly covered and substantially surrounded by the structure of the defendant, which is to be built within eighteen inches on either side of the plaintiff's cars, as they run; that the superstructure is to be not more than fourteen feet in height from the surface of the ground, with cars to be propelled by locomotives, upon an open bridge, so as to be visible to the horses and passengers below; and that the plan of defendant's proposed road involves the running of trains about once in five minutes over the road in each direction at great speed, with stoppages at every half mile. And it is expressly found, in the same finding, that the row of columns on each side of the plaintiff's track will exclusively use and occupy spaces in the

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street that the plaintiff is entitled to use for the purposes of its franchise ; that the damage that is suffered by the plaintiff is peculiar to it, and is otherwise than is suffered from the same cause by the public or others.

Upon the ground, then, that we are entitled to compensation for our valuable corporate rights, franchises, and property, that are proposed to be taken away, as a condition precedent to their appropriation we insist with absolute confidence that the decree appealed from should be affirmed, and the defendants perpetually enjoined from proceeding with their proposed structure.

VI. The route laid out by the commissioners through the Sixth avenue, in front of the plaintiff's property, is illegal and void, and therefore no authority to construct that section of the road, at least, can be derived from their action, because the route there, as so laid out, is an express violation of the prohibitions of the fourth section of the act, by crossing Broadway in two places, as the court below finds, at Fifty-third street, and again at Thirty-third street. The fourth section of the act, which gives to the commissioners power to locate the route over, under, through or across the streets, avenues, places or land in such county, "except Broadway and Fifth avenue below Fifty-ninth street, and Fourth avenue, above Forty-second street, in the city of New York," is an absolute prohibition, as strong as language could make it, against the legality of any route which crosses Broadway within the excepted region. The commissioners not only exceed their power, in so crossing Broadway, but the whole route so laid out in that part of its course, at least within the prohibition limits, is illegal, and leaves the case as if no such route had been designated.

The court of appeals has not decided this proposition against us. All that they have decided is that

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the crossing of Broadway at Thirty-third street and Fifty-third street, between which limits it is clear that the legislature intended that no such route should be built, is not fatal to the rights of the company to an order to appraise the damages of an owner of property in South Fifth avenue, at a distance of more than two miles from the prohibited limits.

VII. If the corporate property, rights and franchises of the plaintiffs are to be taken away, destroyed or substantially impaired, or, in the significant language of Judge ALLEN, "the beneficial enjoyment of them disturbed or interfered with" by the construction and operation of the defendant's proposed railway, by virtue of the *Gilbert Act* or the *Rapid Transit Act*, or of both combined, without just compensation being first paid or secured, then these acts are in plain violation of that provision of the constitution of the United States which says that no State shall pass any law impairing the obligation of contracts, and of the Fourteenth amendment of the constitution, which provides that the citizen shall not be deprived of his property without due process of law (*Milhan v. Sharpe, ut supra*).

The nature and quality of the plaintiff's rights and interests as a railroad company, thus happily defined for us by the highest authority in *Milhan v. Sharpe*, and made completely valid by the act of 1854, confirming them on the part of the State, come clearly within the protection of the provisions of the constitution which we invoke.

All the property of the Sixth Avenue Railroad Company, including, as part of it, the right to be in the avenue for the purpose of operating its road, is the private property of the corporation, having all the sanctity of any other private property, and entitled, so far as it rests on grant from the State, or valid contract with city or State, to the constitutional guaranties

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referred to (*West River Bridge Co. v. Dix*, 6 *How. U. S.* 507; *Boston and Lowell R. R. Co. v. S. & L. R. R. Co.*, 2 *Gray*, 35; 3 *Kenf's Com.* 458; *Benson v. The Mayor, &c.*, 10 *Barbour*, 223; *The Binghamton Bridge*, 3 *Wallace U. S.* 51; *Wilmington R. R. v. Reid*, 13 *Id.* 264.

BY THE COURT.—SANFORD, J.—The learned judge before whom this action was tried at special term, reached the conclusion that the defendant, The Gilbert Elevated Railway Company, had no authority, in law, to construct the elevated railway in Sixth avenue between Amity and Fifty-ninth streets, which it proposed to build pursuant to its charter, and under the provisions of the Rapid Transit Act (*Laws of 1875*, ch. 606), and for the reason that section 36 of that act, upon which the defendant's right to proceed with such construction depended, was unconstitutional and void. He accordingly rendered judgment, that the defendant be enjoined and forever restrained from building such railway. The question of the validity of the rapid transit act, and particularly of section 36, has since been presented to the court of appeals in certain proceedings entitled *In the matter of the petition of the New York Elevated Railway Company*, and in other like proceedings, on the part of the defendant herein, on appeals entitled *Kobbe v. The Gilbert Elevated Railway Company*, and *Anderson v. The same*. And that court has, in those cases, finally and authoritatively determined that the Rapid Transit Act is not obnoxious, in whole or in part, to the constitutional objections urged against its validity; and that, under and by virtue of its charter and the provisions of that act, the defendant has good right and lawful authority to build, over the route provided for it by law, including the Sixth avenue, the railway whose construction is enjoined by the judgment now under review. It is,

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therefore, obvious that the judgment appealed from cannot be sustained upon the ground upon which it was rendered, and that, unless other sufficient reasons for affirming it can be gathered from the pleadings, proofs and findings upon which it was based, it will now be the duty of the appellate branch of the court to direct its reversal.

On the part of the plaintiff and respondent, the Sixth Avenue Railroad Company, it is insisted that the case, as presented, conclusively shows that that company has property, rights and interests, both in its existing railroad and franchises, and also as incident or appurtenant to its lands abutting on the Sixth avenue, the beneficial enjoyment whereof will be destroyed, impaired or disturbed by the construction and operation of the defendant's proposed railway; that such rights and interests are protected by the constitutional prohibition against the appropriation of private property to public use without just compensation; and that the ascertainment of the amount of such compensation, the appraisal of the damages incurred or sustained by reason of such destruction, injury, or disturbance, and the payment, tender, or offer of such compensation, when the amount thereof shall have been determined in the manner provided by law, are conditions precedent to the right of defendant to construct its proposed road; and, finally, that it is entitled, by reason of the threatened invasion of such rights and interests, to an injunction from a court of equity to restrain the construction of the defendant's road until such compensation shall have been made.

It is obvious from a perusal of the opinion filed by the learned judge at special term, that the views therein expressed cover but a part of the case as it was presented at the trial. His determination that section 36 of the Rapid Transit Act was unconstitutional and void, rendered it, in his judgment, unnecessary and

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unadvisable to pursue his inquiries further, inasmuch as by so doing nothing would be gained toward practically determining the rights of the parties. He accordingly declined to consider or pass upon other "grave and important questions" involved, including those now presented to the consideration of the court. In view of this fact, and as the case has not been fully considered in all its aspects, we should, perhaps, under the authority of *Mills v. Van Voorhis* (20 *N. Y.* 412), be justified in reversing the judgment, and directing a new trial, without inquiring whether, upon other grounds than that on which the judgment in its favor was rendered, the plaintiff is entitled to the relief thereby accorded to it. The plaintiff would thus have an opportunity to secure more explicit findings of fact in regard to the proprietary rights and interests with which it claims to be vested, and more specific and deliberate conclusions therefrom as to the legality or lawlessness of their threatened invasion. It would seem that such questions ought to be passed upon, deliberately, by the tribunal of first instance before they are presented for adjudication to the appellate branch of the court. We have, however, thought it not improper, at the urgent instance of the respondent's counsel, to inquire whether the judgment can be sustained, upon the propositions for which they now contend, and we have done so in the hope that the progress of the cause toward a complete and final adjudication might thus be accelerated.

In announcing the result of our deliberations it will be unnecessary to do more than state, briefly, the conclusions at which we have arrived, with the reasons therefor, without endeavoring to enforce them by illustration or argument.

1. The case shows no such invasion and partial destruction of the plaintiff's road and franchise as entitles it to compensation, under the constitutional

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provision for the protection of private property proposed to be taken for public use in the exercise of the right of eminent domain. Compensation must doubtless be made for the appropriation and condemnation of corporate property and franchises, taken in the exercise of the right of eminent domain, equally as in case of the like appropriation or destruction of individual property and rights ; but it appears that no part of the plaintiff's road, as it has been constructed and now exists, will be in any wise disturbed or interfered with by the execution of the plan upon which it is proposed to erect the structure constituting the defendant's elevated road. While it is found as a fact in the case, that the columns to be erected on either side of the plaintiff's tracks, will exclusively use and occupy spaces in the street, *to the use of which the plaintiff is entitled* for the purposes of its franchise, there is no finding, and no evidence, that any space actually appropriated by the plaintiff to such purposes, or which now is or ever has been in its actual use and occupancy therefor, will be invaded, encroached upon, or injuriously approximated by the defendant's columns, platforms, stairways, or any other parts or portions of its proposed structure.

It cannot, therefore, be claimed that the plaintiff is entitled to compensation for the deprivation of any part of its *road*, considered as a physical and corporeal entity. The plaintiff's franchise entitles it to the use of every part of the entire space in the roadway of the Sixth avenue, to the extent requisite for the laying down thereon of a railroad with a double track ; but its franchise is not to be construed as appropriating to its future exclusive use and occupancy, spaces not requisite for that purpose, after it has already exhausted the privilege accorded to it, by appropriating so much of the roadway to the purposes of a double track as its exigencies actually require (N. Y. & Har-

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lem R. R. Co. v. Forty-second St., &c. R. R. Co., 50 Barb. 285, affi'd *Id.* 309).

The alleged appropriation or invasion of any part of the plaintiff's road is expressly negatived by the finding that the running of defendant's cars and engines upon the Sixth avenue, over plaintiff's road, in case the defendant's road were constructed, would not prevent the practical running of plaintiff's cars by horses, or materially increase the expense of such running.

The alleged invasion of its *franchise*, which consists in the right to lay a double track, and to run licensed cars thereon, does not appear, either in the facts found or in the evidence, inasmuch as there is nothing in either tending to show that ample space for laying a double track on the surface of the avenue is not, and will not be, fully available to the plaintiff, notwithstanding the erection of the structure proposed by the defendant, or that the running of its cars thereon will be in any degree obstructed or interfered with.

The plaintiff, by virtue of its franchise, has no control over or interest in that part of the avenue not occupied by its tracks, or actually traversed by its cars (N. Y. & Harlem R. R. v. Forty-second St. R. R., *ut supra*).

Moreover, plaintiff's rights and powers, as a railroad corporation organized under the general law, must be exercised in conformity with, and in subordination to such constitutional legislative requirements and conditions as are, or may be, imposed by valid legislative enactment. Legislative authorization of a parallel and competitive railway involves no appropriation or deprivation of the vested rights and franchises of a railway already constructed, and is not an exercise of the right of eminent domain (Charles River Bridge Co. v. Warren Bridge Co., 11 Pet. 420; Auburn Co. v. Doug-

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las, 9 *N. Y.* 444; *Rensselaer R. R. v. Davis*, 43 *Id.* 137; *Ft. Plain Bridge Co. v. Smith*, 30 *Id.* 44). Any loss or damage sustained by reason of the competition of such lawfully authorized railway is *damnum absque injuria*, for which no compensation can be required.

Private property cannot be said to be taken for public use, in the exercise of the right of eminent domain, merely because its value is impaired by the proximity of other property legitimately employed for the public use and benefit, under the sanction and by the authority of a legislative enactment. The finding, therefore, that the construction and operation, upon the Sixth avenue, of defendant's proposed railroad, would occasion special damage and injury to the plaintiff, is of no importance as bearing upon the question of the plaintiff's constitutional right to compensation for an interference, for the public benefit, with the beneficial use and enjoyment of its property.

If the proposed elevated railway, as was held at special term, was unauthorized by law and a public nuisance, such finding would be essential to the maintenance, by the plaintiff, of an action to enjoin its construction; but, inasmuch as it is not a public nuisance, and as the use to be made of so much of the avenue as it shall of necessity occupy is duly authorized by law, and is declared to be a public use, consistent with the uses for which such avenue is publicly held, this finding is immaterial. Such special damage results from no interference on the part of the defendant with either the franchise or tracks of the plaintiff. The plaintiff's railroad and its double track may remain on the surface of the avenue in the exact locality it has always occupied, without the displacement of a single rail or switch; and the franchise of maintaining and operating it, and running licensed cars thereon, so far as appears from the evidence, may be beneficially used and en-

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joyed, hereafter as heretofore, without let or hindrance on the part of the defendant. The findings of the court at special term are to this effect.

2. The plaintiff has no easement or property right in the roadway of Sixth avenue, incident or appurtenant to its ownership of lands abutting thereon, the beneficial use or enjoyment whereof will be destroyed, diminished, impaired, or interfered with by the construction or operation of the defendant's proposed railway.

It does not appear from the evidence that any one, from or through whom the plaintiff's title to its adjacent lands is derived, was ever vested with title to the land now constituting Sixth avenue. It does appear that the title of the former owners of that land was absolutely and forever divested, and that the title thereto, in fee simple, was acquired by the corporation of the city of New York, under and by virtue of proceedings had for that purpose, pursuant to the act of 1813.

A long array of judicial decisions is cited in support of the proposition that the city corporation is fully vested with an absolute title in fee simple to the lands comprised within the limits of streets and avenues opened and laid out pursuant to that act. Nor is that proposition controverted. The contention of the plaintiff is that, notwithstanding the provisions of the act of 1813, under the operation of which the fee of any street or avenue may be deemed to have been taken from the former owners thereof, and vested in the corporation, in trust, as provided thereby, the owners of property fronting on such street or avenue are entitled, by virtue of their ownership, and of the abutment of their property upon such street or avenue, to have the same maintained as a highway, and forever kept open for all the uses and purposes of a highway, unincumbered throughout its length and breadth, by any obstruction which shall prevent or impair the use of

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every inch of it, either by the public or by abutting owners, for all the public uses and common purposes of a highway.

And it is insisted, with great earnestness and force, that this right, to which, as an abutting owner upon Sixth avenue, the plaintiff claims to be entitled, is, in its nature, a proprietary interest in land, a property interest in the maintenance of the avenue as a highway, by virtue whereof the plaintiff is entitled to compensation, in case of any infringement thereon, in the exercise of the right of eminent domain.

The argument in support of this position proceeds mainly upon the assumption, not warranted by the evidence in this case, that the land comprised within the limits of the avenue was taken from persons who were, also, at the time, owners of the land adjacent to and abutting on its exterior lines; and that the compensation awarded to such persons for the land taken consisted chiefly in the benefits and advantages acquired by them, as owners of the abutting lands, in having a broad highway opened in front of their remaining property, the use of which, as such, was forever secured by the trusts declared by the act.

Whatever benefits and advantages the owners of adjacent lands acquired, by virtue of opening the avenue, was paid for by assessments charged thereon, whether such owners were or were not proprietors of the lands within the limits of the avenue. And the trusts declared by the act were as much for the benefit of adjoining owners who had no interest in the land taken, but who paid such assessments in cash, as of those whose awards for damages, by reason of the condemnation of their lands within the lines of the avenue, proved the equivalent of assessments for benefit imposed upon their lands adjacent to, but without such lines. In each case adjacent owners contributed their respective shares of the expenses incurred in

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effecting the improvement. But they acquired by such contribution no exclusive right or interest in the street or avenue, and no easement in the nature of a right of way over the same, other than that which is held and enjoyed by the public at large. Abutting owners, as such, have no special and peculiar interest in the enforcement of the trusts declared by the act. Those trusts were created and declared for the benefit of the public, and the people at large, acting through the legislature, are at liberty to determine in what manner they shall be carried into effect. The views expressed in the case of the Brooklyn Park Commissioners v. Armstrong (45 *N. Y.* 245), commend themselves to our approval, and if sound they are conclusive against the claim of the plaintiff to compensation for the deprivation of any supposed property right in the avenue, existing as appurtenant to their lands abutting thereon.

The like conclusion has, very recently, been adopted by one of the learned judges of the New York common pleas, in the case of Story v. New York Elevated Railroad Company (October, 1877), and the following cases, cited by him, seem to sustain fully the correctness of his decision: *Lansing v. Smith*, 4 *Wend.* 9; *Benedict v. Goit*, 3 *Barb.* 459; *First Baptist Church v. Utica & Schenectady R. R. Co.*, 6 *Id.* 313; *Drake v. Hudson R. R. Co.*, 7 *Id.* 508; *Radcliff v. Mayor of Brooklyn*, 4 *N. Y.* 195; *Gould v. Hudson River R. R. Co.*, 6 *Id.* 522; *People v. Kerr*, 37 *Barb.* 357; *S. C.*, 27 *N. Y.* 193; *Coster v. Mayor of Albany*, 43 *Id.* 414; *Kellinger v. Forty-Second St. R. R. Co.*, 50 *Id.* 206.

But it is further urged, as a fatal objection to the defendant's claim of full right and authority to construct its road through Sixth avenue, that the route laid out for it by the commissioners appointed under the Rapid Transit Act is in direct violation of the implied prohibition contained in the fourth section of the act, with respect to crossing Broadway. The court of

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appears seems to have determined, in the cases of Kobbe and Anderson, above cited, that the right of the defendant to proceed under the act with respect to any part or portion of its road, not directly affected by this implied prohibition, is clear and unquestionable; that, if crossing Broadway is prohibited by the act, such crossing is excluded by the commissioners from the routes designated by them, inasmuch as they expressly exclude from such routes, any street or part thereof, the use of which for the purposes of an elevated railway is excluded by the act; and that such exclusion does not invalidate the authority conferred by the act with respect to the residue of the designated route. In so far as such residue coincides with the existing route of a railroad corporation, such corporation may build upon the route designated. The authority is at least co-extensive with the coincidence. If, therefore, the plaintiffs were entitled to an injunction upon this ground, it would only extend to and operate upon such portions of the defendant's route as are included within the intersecting lines of Broadway.

But the elements of interest and irreparable injury which are essential to the invocation of equitable interposition by injunction are wanting to any claim of the plaintiff with respect to merely that part of the defendant's route which intersects Broadway, and we do not understand counsel as claiming anything by virtue of this particular objection, unless it be held to invalidate the authority of the defendants with respect to the whole of Sixth avenue. We are of opinion that the judgment cannot be upheld either upon this or the other grounds urged in support of it. It must therefore be reversed and a new trial ordered, with costs to appellant to abide the event.

CURTIS, Ch. J., and FREEDMAN, J., concurred.

Statement of the Case.

JOHN H. MOHR, PLAINTIFF AND RESPONDENT, v.
ALBERT O. PARMELEE, DEFENDANT AND
APPELLANT.

PARTY WALL, WHEN BREACH OF COVENANT AGAINST
INCUMBRANCES.—DAMAGES.—WHEN COVENANTS RUN
WITH LAND.

A party wall standing equally upon the land of adjoining proprietors, and whose central line is throughout coincident with the line of division between their respective premises, constitutes no incumbrance upon or defect in the title of either, such as will relieve a purchaser from his contract, or entitle him to compensation, notwithstanding that the owner may have covenanted with him to convey by good title in fee simple, free of incumbrance (*Hendricks v. Stark*, 37 *N. Y.* 106). But a party wall, as in this case, wholly on one of two contiguous lots of land, yet subject to appropriation and use for all the purposes of a party wall by the proprietor of the other, whether for a term or in perpetuity, and whether the privilege was given by *grant*, as in this case, or by license, covenant, or prescription, constitutes an incumbrance upon, or a defect in the title of the lot on which it stands (*Giles v. Dugro*, 1 *Duer*, 831).

When the title is so incumbered by reason of the prior grant of such an easement, a right of action immediately accrues on the covenant against incumbrances, by reason of the breach thereof. Whether the covenantee had or had not notice or knowledge of the existence of the incumbrances, is immaterial to his right of action, or to the question of damages.

More than nominal damages may be recovered in such case. The rule as to damages laid down in *Giles v. Dugro* (*supra*), approved.

- The criterion for determining whether a covenant runs with the land, is the intention of the parties, and if the covenants be of such a nature that they can run with the land, and the deed expresses such an intent, they bind, not only the original parties, but the subsequent owners of the respective premises (Per DWIGHT, C., *Brown v. McKee*, 57 *N. Y.* 684).

Statement of the Case.

Before CURTIS, Ch. J., and SANFORD, J.

Decided January 14, 1878.

Appeal by defendant from a judgment entered in favor of plaintiff upon the verdict of a jury.

The action was brought to recover damages for the breach of a covenant against incumbrances, contained in a deed from defendant to plaintiff, bearing date January 17, 1870, and purporting to convey to the plaintiff, in fee, certain premises in the city of New York, consisting of a lot of land with the dwelling-house thereon, said lot being twenty-one feet and eight inches wide, by ninety-eight feet and nine inches deep.

The complaint alleges that on January 17, 1870, by deed bearing date on that day, and duly executed under seal, the defendant, in consideration of \$22,000, conveyed said premises, house and lot, to the plaintiff. That such deed contained, among other covenants, the following: "That the same, [meaning said premises,] now are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, . . . and incumbrances of what nature and kind soever." That on December 29, 1852, one Alfred North, from and under whom the defendant derived title, and who then owned said premises in fee, executed and delivered to Joseph Walker, who was then the owner, in fee, of the lot of land next adjoining, an instrument in writing under, seal whereof a copy is annexed to and made part of the complaint. Such instrument recites that North owns in fee the lot of land and dwelling-house first above mentioned, and that Walker is the owner in fee of the lot adjoining, and is about to erect thereon a dwelling-house. Thereupon, in consideration of the premises and of \$300 paid to him by Walker, North, for himself, his

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heirs, executors, administrators and assigns, covenants, *grants*, promises and agrees, to and with the said Walker, his heirs, executors, &c., that he and they shall and may in the erection of such dwelling-house, make use of the northwesterly wall of the dwelling-house of said North or as such thereof as said Walker, his heirs, &c., may desire, to the extent of four inches in depth, as a party wall, and as a side wall of said dwelling-house proposed to be erected, to be used and continued as such party wall and such side wall forever. It was further mutually covenanted and agreed by and between the parties to such agreement, that the same should be perpetual, and should at all times be continued as a covenant running with the land ; but should not be deemed, construed or implied, as vesting in Walker, his heirs, &c., and assigns, any legal right, title or interest of, in, or to the ground or soil, or any part thereof, on which the said party wall now stands, but that the whole thereof should remain and continue in the said Alfred North, his heirs, executors, administrators, or assigns forever, in the same manner, and to the same extent as if such agreement had not been executed, *except only* as to the perpetual appropriation, use and enjoyment and easement of the said party wall, as a party wall, by and between the said two lots of ground and the house erected and to be erected thereon.

The complaint further avers that after the execution of such agreement, Walker availed himself of the rights, privileges, and easements thereby granted, and built a house on his lot, using, in the construction thereof, the northwesterly wall of North's house as the southeasterly wall of his, said Walker's, house. That at the time of his purchase, the plaintiff was wholly ignorant of such agreement and easement, and that said easement is a damage and injury to the extent of \$2,000.

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The answer puts in issue the allegation of the complaint with respect to the plaintiff's knowledge of the said instrument and easement, and the damage or injury thereby occasioned, and avers that such instrument was recorded in the office of the register of the city and county of New York, on August 9, 1873 ; and that plaintiff, at the time when he bought, had full notice and knowledge thereof.

Some evidence was adduced on the trial with respect to the question as to whether the plaintiff had actual notice of the existence of such agreement, or of the appropriation and use of the said wall, as a party wall, and as the side wall of the adjoining building ; but the court held such evidence to be immaterial, and that the only question for the jury was that relating to damages.

Defendant's counsel requested the court to charge :

(1.) That the record of the agreement, at the time of plaintiff's purchase, was notice to plaintiff of the incumbrance, and must be considered in mitigation of damages.

(2.) That no interest in the land on which the wall is built is conveyed by the agreement.

(3.) That the rules governing the measure of damages for breach of covenant against incumbrances, where no actual damage is shown, is nominal, and no damage can be inferred.

(4.) That the damage in this case is not an actual damage in contemplation of law.

(5.) That a party wall is not, as matter of fact, an injury to land.

The court submitted to the jury the question whether or not the plaintiff had sustained any damage of a substantial character, charging that if not, only a nominal sum was recoverable ; but, that if the plaintiff had sustained real substantial damages, the amount thereof would be equivalent to the diminution

Appellant's points.

in value, on January 17, 1870, of the property purchased by reason of the existence of the incumbrance, together with interest thereon from that date.

Exception was taken to the refusal of the court to charge as requested, as to notice of the agreement and the effect thereof, also as to the measure of damages, and generally as to the several requests preferred.

No part of the charge, as delivered, was made the subject of objection or exception.

The jury found for the plaintiff.

A motion for a new trial on the judge's minutes was made and denied.

The defendant appealed from the judgment entered on the verdict, but not from the order denying the motion for a new trial.

R. H. Bowne, attorney, and *S. P. Nash*, of counsel, for appellant, among other things, urged:—I. The agreement did not create an incumbrance upon the premises granted, and plaintiff therefore showed no breach of the covenant (*Harsha v. Reid*, 45 *N. Y.* 415; *Cole v. Hughes*, 54 *Id.* 444; *Col. College v. Lynch*, 39 *Super. Ct.* 374). The agreement was not contained in any conveyance of the land, but was a purely personal agreement between the parties to it, and did not run with the land. The whole arrangement, therefore, lay in *covenant*, not in *grant*. Plaintiff not having himself covenanted, and not being assignee of North's covenant, is not bound by it, and can compel the owner of the adjoining house to remove the beams, whose remedy for the consequent damages would be against North and his representatives (2 *Washb. R. P.* 262-3; 4 *Kent*, 472-3).

II. The wall had been used by the insertion of the beams of the adjoining house, before the plaintiff bought and took possession. He had not been disturbed in his occupancy; had paid nothing to dis-

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charge the incumbrance, and suffered no actual damage. He was, therefore, entitled to recover only nominal damages. The case of *Giles v. Dugro* (1 *Duer*, 331), will be cited as adverse to both the foregoing positions, but in that case the parties to the party wall agreement acquired an interest in the *land*, which, in the case at bar, was expressly excluded by the agreement.

III. The allowance of interest was at all events erroneous. The plaintiff was in possession; had never paid out anything to remove the incumbrance, and, therefore, was not entitled to interest (*Grant v. Talman*, 20 *N. Y.* 191, 196).

Barlow & Olney, attorneys, and *Francis C. Barlow*, of counsel, for respondent, among other things, urged:—I. A party wall *proper* has been held by the court of appeals to be no incumbrance or injury (See *Hendricks v. Stark*, 37 *N. Y.* 106). The reason of this is, that the wall being equally on each lot, the injury to each is exactly counter-balanced by the benefit. But where the wall is all on one lot, without any gain from the neighboring lot, or where the whole expense is borne by one lot, and the owner of the latter can never control his own premises, or tear down his wall, without the consent of his neighbor, the case is different, and it is an injury. This point was decided by this court in *Giles v. Dugro* (1 *Duer*, 331, approved in *Lamb v. Danforth*, 59 *Me.* 324).

II. To the point that the record of the agreement was notice to the plaintiff of the incumbrance, and that such knowledge by him at the time of the purchase constituted a defense, there are two conclusive answers:—*First*. No actual notice was proved, and the record was not constructive notice. If an instrument relating to real estate is not recorded, a subsequent purchaser "in good faith," *i. e.*, not having actual notice, is not bound by it (See 3 *R. S.* 5th Ed.

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p. 45, § 1). All that is meant by this is that *as between two purchasers*, a recorded instrument is notice; but this is only *as between two purchasers*. That is to say, Walker having recorded this agreement, the defendant, who subsequently bought from North, was bound by it against Walker. And so, also, the plaintiff was bound by it as against Walker. The recording act (*supra*) does not say a word about the record being *notice* to any one. That the agreement was recorded, protected *Walker* against the defendant, and also against the plaintiff, but it had no effect as between the defendant and his grantee. This is held in *Roberts v. Levy* (3 Abb. N. S. 311), which case, however, wrongly holds that notice, if proved, is any defense to an action of this kind. *Secondly*. It is well settled that notice of an incumbrance, if proved, is no defense. Sometimes the covenant against incumbrances is inserted for the very reason that the grantee *does know* of the incumbrance, and wishes to guard against it (See *Suydam v. Jones*, 10 Wend. 181; *Harlow v. Thomas*, 15 Pick. 66; *Townsend v. Weld*, 8 Mass. 146; *Long v. Moler*, 5 Ohio St. 271; *Rawle on Covenants*, 4th Ed. pp. 116, 117). The rule is the same as to a warranty of title of chattels (See *Dresser v. Ainsworth*, 9 Barb. 619).

III. The question "what was the value diminished by the incumbrance," is the exact form approved in *Wetherbee v. Bennett*, 2 Allen, 428; and see *Harlow v. Thomas*, 15 Pick. 66, and at p. 69. It is the proportion in *value* and not in *quantity* between the land to which title fails, and the whole, which is the measure of damages.

IV. The rule may be cited which provides that damages cannot be recovered for incumbrances unless they have been paid or removed. But this applies only to such incumbrances as judgments, mortgages or dower rights, which have a money value, or which, it

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is to be presumed, can be removed by the payment of money. But this rule does not apply to easements, or to incumbrances of a permanent character, which cannot be removed as a matter of right. As to the distinction just mentioned, see *Harlow v. Thomas*, 15 *Pick*, 66, and at p. 69; 3 *Washburn on Real Property* [4th ed.], page 495 [top paging], and cases cited, *Id.*, pp. 459 and 460, top paging; also *Giles v. Dugro*, 1 *Quer*, at foot of page 335.

V. We have seen in *Giles v. Dugro* that this was a partial eviction or failure of title. The plaintiff is considered as never having had possession of this wall. Now the rule in cases of eviction, or failure of title, as to interest, is this. If the consideration paid was \$22,000, and the purchaser never acquired possession, then of course the measure of damages is the \$22,000, and interest from the time of its payment. If the purchaser still holds possession, but the title has failed, or if, after holding possession for a period, he has been evicted, the rule is that the measure of damages is the consideration money, with interest for six years from the date of its payment, provided he has occupied so long. After six years, no interest is allowed, if he has been in possession (See *Caulkins v. Harris*, 9 *Johnson*, 324; *Pitcher v. Livingston*, 4 *Id.* 10; *Guthrie v. Pugsley*, 12 *Id.* 126). The rule as to covenants against incumbrances is stated in *Pitcher v. Livingston*, *supra*, at middle of p. 10.

VI That interest is allowable, see *Cornell v. Jackson*, 3 *Cushing*, 510.

VII. There was no ground for the motion for a new trial on the minutes, and it was properly denied. McCool, the defendant's own witness, put the damages at \$1,000. The method by which some of the witnesses got at their estimate was somewhat fantastic, but Bockell made it \$2,500, and Waugler made it \$3,500. This amply sustains the verdict. And this objection

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cannot be made anyway, there being no appeal from an order denying a new trial on the minutes (see *Matthews v. Meyberg*, 63 *N. Y.* 656).

BY THE COURT.—SANFORD, J.—The points made by defendant's counsel, upon the argument, as constituting grounds for a reversal of the judgment, are :

(1.) That the agreement between North and Walker constituted no incumbrance upon the premises granted, and, therefore, the plaintiff showed no breach.

(2.) That no actual damage had been shown, and only nominal damages were, therefore, recoverable.

(3.) That if entitled to recover more than nominal damages the plaintiff was not entitled to the diminution in value of the property at the time of his purchase, by reason of the existence of the incumbrance, as charged by the court, but only to such sum as would bear to the actual consideration paid for the conveyance, the same ratio which the portion of the premises as to which title has failed, bears to the whole property.

(5.) That the allowance of interest was at all events erroneous.

A party wall standing equally upon the land of adjoining proprietors, and whose central line is, throughout, coincident with the line of division between their respective premises, constitutes no incumbrance upon, or defect in, the title of either, such as will relieve a purchaser from his contract or entitle him to compensation, notwithstanding that the owner may have covenanted with him to convey by good title, in fee simple, free of incumbrance (*Hendricks v. Stark*, 37 *N. Y.* 106). In such case the detriment sustained by each tenement, in becoming servient to the other, is compensated by the benefit it derives from having the other made equally servient to it.

But a party wall wholly on one of two contiguous

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lots of land, yet subject to appropriation and use for all the purposes of a party wall by the proprietor of the other, constitutes an incumbrance upon or defect in the title of the lot on which it stands, for the reason that it restricts the use, and impairs the enjoyment thereof, without imparting any corresponding benefit or advantage thereto. In the one case each of the two tenements is at the same time dominant over and servient to the other, in equal degree. There is entire reciprocity in their mutual relation. In the other case no such reciprocity exists. The tenement that sustains and supports the wall is merely servient. That to which only its use appertains is wholly dominant. The servitude that attaches in the one case is an incumbrance which impairs the estate. The domination acquired in the other is a privilege that enlarges it (*Giles v. Dugro*, 1 *Duer*, 331). The irrevocable privilege of using a wall as a party wall, whether for a term or in perpetuity, and whether acquired by grant, license, covenant, or prescription, constitutes an easement, and is, consequently, an incumbrance. Such a privilege was conferred and created by the deed between North and Walker, annexed to the complaint. That deed, in terms, *grants* to Walker, his heirs and assigns, precisely such a privilege. He availed of it for the benefit of the premises then owned by him. Thereby and by virtue of the terms of the grant it became appurtenant to those premises, and thus passed under their conveyance. It is insisted, on the part of the defendant, that it was expressly provided by the terms of the grant, that nothing therein contained should be construed as vesting in Walker, his heirs or assigns, any legal right, title, or interest in the ground or soil, or any part thereof, on which the said party wall now stands.

And it was argued, that by reason of this proviso the covenant of the grantor was a mere personal cove-

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nant, and did not run with the land. But the premise from which this conclusion is deduced is incorrectly stated. It is true that a covenant, to the effect stated, is inserted in the deed, but this covenant is itself qualified by an exception which is fatal to the inference. It is mutually covenanted that Walker and his heirs shall acquire no interest in the soil, "*except only* as to the perpetual appropriation, use, enjoyment, and easement, of the said party wall as a party wall, by and between the said two lots of ground and the house erected and to be erected thereon." This language can only be construed as expressing an intent to vest in Walker, his heirs and assigns, an interest in the land, to the extent specified in the exception ; that is to say, to vest in him and them a *perpetual easement* on and over the soil occupied by the wall. So far from frustrating the declared intent of the parties, that the agreement between them should be perpetuated and at all times "continued as a covenant running with the land," this language confirms and corroborates such intent and indicates the purpose to create a servitude and easement "by and between the said *two lots of ground*." The criterion for determining whether a covenant runs with the land is the intention of the parties ; and if the covenants be of such a nature that they can run with the land, and the deed expresses such an intent, they bind not only the original parties but the subsequent owners of the respective premises (Per DWIGHT, C., *Brown v. McKee*, 57 N. Y. 684). The plaintiff's title having been incumbered at the date of the conveyance to him by the existence of an easement incapable of removal at his option, by any payment or tender, or having failed *pro tanto*, by reason of the prior grant of such easement, a right of action immediately accrued to him upon the defendant's covenant, by reason of the breach thereof.

It is quite immaterial to the plaintiff's right of ac-

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tion, or to the question of damages, that he had or had not notice of the existence of the incumbrance. If aware of it, he had the option of rejecting the deed or of accepting it and relying on the defendant's covenant. Had the premises been incumbered by the lien of a tax, a judgment, or a mortgage, it surely would not be pretended, that the defendant's liability therefor would be discharged by plaintiff's knowledge of the fact. This point, however, was not presented by the appellant on the argument, either orally or otherwise, and is deemed to have been abandoned.

There was evidence tending to show actual and substantial damage from the date of his purchase. The plaintiff was excluded from the use and occupancy of the wall of his dwelling, in so far as it was used as a party wall or as a side wall of the dwelling-house erected on the adjoining land. The judge submitted to the jury the question whether, by reason of such exclusion, the plaintiff did or did not sustain damages of a substantial character. No exception was taken to the charge, and no appeal having been taken from the order denying defendant's motion for a new trial, we cannot consider questions of fact. The case of *Giles v. Dugro*, above cited, is authority for the proposition that more than nominal damages are recoverable.

If the rule of damages laid down by the learned judge in his charge is not precisely in accordance with that prescribed in the case of *Giles v. Dugro* (*ut supra*), the case presents no exception which raises the question of its accuracy. The charge as delivered was not excepted to. Exception was taken to the refusal of the judge to charge as requested, as to the measure of damages, but the defendant's requests contained no reference to the rule properly applicable to the case. They simply called for an instruction to the effect that nominal damages only were recoverable. In withholding such instruction, no error was committed. The

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rule now contended for by defendant is much more objectionable than that laid down by the court, if indeed the latter be objectionable at all. It is insisted that inasmuch as the whole consideration for the conveyance of twenty-one feet and eight inches was \$22,000 while the total failure of title extended only to four inches, the damage should have been \$340, instead of \$1,350 as awarded by the jury.

In other words, that the damages are limited to a sum which bears to the whole consideration of the conveyance, the same ratio which the size of the part of the premises as to which there is a failure of title bears to the size of the entire tract attempted to be conveyed.

This rule assumes that every separate part of a tract of land is of the same value with every other part of the same dimensions, and that the value of the whole is equivalent to the aggregate of the values of as many separate parts as the whole is divisible into. The assumption is fallacious and incorrect.

A parcel of arable land may be worth far more than all the rest of a farm of which it constitutes but a small part, and the value of a city lot, twenty or more feet wide, may be much greater in proportion to its width than a narrow strip of the same premises.

Had objection been made to the charge of the court in this regard, or had the attention of the learned judge been directed to the true rule by a proper request, it is reasonable to suppose that there would have been no ground for the imputation of error. As it is, any adverse criticism is disarmed by the absence of objection or exception, and of any suggestion by counsel as to the measure of damage properly applicable to the case. The variance between the charge and the rule as laid down in *Giles v. Dugro*, if any there be, is too slight to be regarded under all the circumstances of the case. The same observations apply to

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the objection that interest is not recoverable. The question was not raised at the trial, and the ruling of the court with respect to it is not now under review.

Various exceptions taken to the ruling of the court upon questions relating to evidence are effectually disposed of by the views above expressed. The only grounds for reversal urged on the argument, or in the printed points of the counsel for the appellant, are those which have constituted the subject of this discussion. All others are deemed to have been waived or abandoned.

The judgment should be affirmed, with costs of the appeal.

CURTIS, Ch. J., concurred.

Statement of the Case.

STEPHEN WRAY, PLAINTIFF AND RESPONDENT, v.
FRITZ FEDDERKE, DEFENDANT AND APPELLANT.

CHATTEL MORTGAGES.—PRIORITY OF LIENS.

In case of two mortgages executed by the same person upon same property, but to different persons, dated the same day, and filed same minute, where it was the agreement and intention of the parties that one should have a preference and priority over the other as a lien upon the property, that agreement must be sustained (*Jones v. Phelps*, 2 Barb. Ch. 440).

This priority of lien of the mortgage and the respective rights of parties having been established, they cannot be affected nor changed by the neglect of the owner of the mortgage that has the prior lien, to refile it, within the year, nor by the diligence of the owner of the other mortgage to refile his in due time. The latter party had notice of the other mortgage, and took his mortgage subject to it. The object or effect of the statute in regard to the annual refileing of a chattel mortgage does not reach his case. He was a mortgagee previous to the omission to refile, and in no sense a *subsequent* mortgagee in the sense of those words in this statute.

The word *subsequent*, in this statute, is held to mean after the time when by statute the mortgage should have been refiled (*Meech v. Patchin*, 14 N. Y. 71).

In this case there was evidence of a default in the payment of the first mortgage after a demand was made by the mortgagee from the mortgagor, and this was within the first year after it was given, and thereby the title of the mortgagee to the mortgaged property became absolute (*Burdick v. McVanner*, 2 Den. 170).

The fact that the mortgagee took subsequent mortgages, upon the same property, from the mortgagor, to secure in part his original debt, did not affect his then existing rights under the first mortgage (*Westcott v. Gunn*, 4 Duer, 112).

Evidence of the intentions of the parties as to priority, and as to valuable consideration for the execution of the mortgage, may be given *dehors* the instrument itself, for the purpose of rebutting the statutory presumption of fraud, &c., where the possession of the property remains in the mortgagor (*Baskins v. Shannon*, 3 N. Y. 310).

Statement of the Case.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided February 4, 1878.

This is an appeal by defendant from a judgment in favor of plaintiff for \$937 81, entered upon a verdict, and from an order denying a motion for a new trial on the minutes. The action was for the conversion of certain billiard tables and implements.

Prior to June 29, 1871, plaintiff leased to August Koch, certain premises, at 208 Eighth-avenue, for a billiard saloon, and Koch owned and had, at said premises, five billiard tables and the usual additional implements and furniture. On November 28, 1870, defendant recovered a judgment against Koch for \$1,280.04. On June 21, 1871, an execution on this judgment was issued to the sheriff, who thereupon levied upon Koch's property in the billiard saloon, and was about to sell it. Under these circumstances plaintiff offered to assist Koch in effecting a settlement. Accordingly, on June 29, 1871, plaintiff, Koch and defendant met at the office of N. A. Chedsey, defendant's attorney in that action, and a settlement was carried out. Plaintiff gave to Chedsey, as defendant's attorney, a check for \$900, payable to the order of and indorsed by Koch. Chedsey drafted and Koch executed a chattel mortgage upon his billiard tables and furniture to plaintiff, payable on demand, for \$900, borrowed money. Chedsey countermanded the execution, and plaintiff left Chedsey's office, leaving the others there.

After plaintiff left the office Chedsey drafted and Koch executed a second chattel mortgage to defendant, payable on demand, for \$130.82 upon the same property, which had just been mortgaged to plaintiff. The consideration for this mortgage is not stated in it.

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Koch says it was for fees in the action ; defendant, for a balance due on the judgment.

These two mortgages were each filed in the New York register's office, on June 29, 1871, at 1.02, P. M. Plaintiff's mortgage was numbered 3082, and defendant's 3083. There is no positive proof who filed them. The two mortgages were made by the same person, on the same property, dated the same day, and filed the same minute. The testimony, however, is that plaintiff's mortgage was executed before defendant's in point of time, and was intended by the parties to constitute the prior lien. Defendant asserts that he did not know of the plaintiff's mortgage till some months later. This statement is contradicted by other testimony. Plaintiff demanded payment of his mortgage during the first year after it was given, but it has never been paid. Plaintiff's mortgage never was refiled. Koch, during the succeeding three years, fell behind in his rent, and in each year executed new mortgages to plaintiff on the same property ; one in 1872 for \$1,600, filed July 3, 1872 ; one in 1873 for \$2,000, and another in 1874 for \$2,000. The consideration for each mortgage was in part the original loan of \$900, and unpaid rent for the residue. Plaintiff did not surrender any of the earlier mortgages. Each was an additional security. Defendant's mortgage was duly refiled for several years on June 28, 1872, June 27, 1873, and on June 27, 1874.

At the end of the first year, defendant, supposing that his mortgage had become a prior lien to plaintiff's, through plaintiff's omission to refile, applied to his attorney Chedsey, to foreclose his mortgage. He executed a power of attorney to foreclose to one of Chedsey's clerks. Chedsey had already advised defendant that plaintiff's mortgage was first, and he refused to act. Defendant thereupon did nothing further for two years and a half. About December 12, 1874, he em-

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ployed a lawyer, named Nehrbas, and a city marshal, named Clarke, to foreclose the mortgage. Clarke went to Koch's billiard room. Plaintiff there met Clarke and notified him that he had the first mortgage on the property. Clarke then went back to Nehrbas and demanded a bond of indemnity. Clarke also searched in the register's office, and found, as he testifies, "that the mortgage held by Mr. Fedderke was the first mortgage, because it was refiled first." A bond of indemnity was given to Clarke on December 21, 1874. He thereupon put a man in charge, who continued in charge six or seven days. On December 22, 1874, plaintiff gave Clarke written notice of his rights. The property was removed to an auction room late on Saturday night, December 26, 1874, and sold Monday morning, December 28, 1874. Four of the five tables were purchased by the defendant. The gross proceeds of the sale were \$155.51, net proceeds, \$72.

The plaintiff made a formal demand for the return of this property before suit. Two of the tables defendant still had at the time of the trial; the other two he had sold.

Chauncey Shaffer, for appellant.

George C. Holt, for respondent.

BY THE COURT.—CURTIS, Ch. J.—The evidence clearly establishes that the plaintiff's chattel mortgage was executed before the defendant's, in point of time, and was intended by the parties to constitute the first lien. Though the two mortgages were made by the same person, on the same property, dated the same day and filed the same minute, yet effect must be given to the agreement and intention of all parties, that the plaintiff's mortgage should have a preference over the defendant's as a prior lien upon the mortgaged chattels (*Jones v. Phelps*, 2 Barb. Ch. 440).

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The priority of the plaintiff's mortgage, and the respective rights of the parties having been established, they were not affected, as between the parties, by the plaintiff's omission to refile his mortgage within the year, or by the defendant's diligence in duly refiling his. The defendant had notice of the plaintiff's mortgage, and his was taken subject to it. The object of the statute enacting that a chattel mortgage unless thus refiled should "cease to be valid, as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith," does not reach a case like the defendant's. He was a mortgagee previous to the omission to refile, and in no sense a subsequent mortgagee.

The word "subsequent" is held to mean after the time when it should have been refiled (*Meech v. Patchin*, 14 *N. Y.* 71).

It also is shown that the plaintiff demanded payment of his mortgage during the first year after it was given, which not being complied with, his title to the mortgaged property became absolute (*Burdick v. McVanner*, 2 *Den.* 170). The plaintiff was thus placed in a position to maintain an action for the conversion of this property, and his taking subsequent chattel mortgages upon the same property to secure in part his original debt, did not affect his existing rights under the first mortgage (*Westcott v. Gunn*, 4 *Duer*, 112).

The defendant excepted at the trial, to the admission of evidence of the conversation between the parties, when the chattel mortgages were executed and the money paid by the plaintiff. It was competent to show the agreement and intention of the parties as to priority, and that the mortgage to plaintiff was executed for a valuable consideration paid by the plaintiff, and for the benefit of the defendant. This may be shown by evidence *dehors* the instrument itself, to rebut the statutory presumption of fraud, under which a chattel

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mortgage unaccompanied by a change of possession was given (*Baskins v. Shannon*, 3 *N. Y.* 310).

• The defendant excepted to the allowance of this question asked by the plaintiff of the person who drew the two chattel mortgages, and who was then the attorney of the defendant, and whom he called as a witness: "Have you never stated subsequently to this time (the time he drew the first mortgage, and the defendant's mortgage) in reference to those two mortgages, that the mortgage of Mr. Wray was the first." As a general rule, proof of statements made by a witness out of court, in order to corroborate what he testifies to at the trial, are inadmissible (*Robb v. Hackley*, 23 *Wend.* 50). But it will be observed, that in the present case, the question was asked upon the re-direct examination of the witness, and after the defendant, upon his cross-examination, had introduced the subject and asked him questions as to what he had said at any time respecting it. Under the circumstances the question was admissible.

Several witnesses were examined as to the value of the mortgaged chattels when taken possession of by the defendant. There was some conflict of testimony on this point, and manufacturers and dealers in the articles were examined, but in considering it as a whole, there is no sufficient reason for disturbing the finding of the jury on the question of the amount of damages.

The evidence shows that the mortgage to the plaintiff was executed in good faith, that the plaintiff parted with and paid the full consideration mentioned in it, and that it passed to the defendant's benefit. There is nothing that conflicts with this, or that tends to show any fraud or fraudulent intent on the part of the plaintiff. The consideration of each of his subsequent mortgages was shown, there was nothing in them that tended to impeach the fairness of the first mortgage, or

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to show that they were not executed in good faith, and these subsequent mortgages were not claimed on the trial to have any priority over the defendant's mortgage. Under such circumstances, the court was not called upon to present this question of fact to the jury, the evidence concerning it being so conclusive that a verdict contrary to it should be set aside (*Carnes v. Platt*, 7 *Abb. Pr. N. S.* 47).

The exceptions of the defendant are insufficient to warrant the reversal of the judgment and the granting of a new trial.

The judgment appealed from, and order denying the defendant's motion for a new trial, should be affirmed with costs.

SEDGWICK and FREEDMAN, JJ., concurred.

THE NATIONAL BUTCHERS' AND DROVERS'
BANK, PLAINTIFF AND RESPONDENT, v. THEO-
DORE R. B. DE GROOT, DEFENDANT AND
APPELLANT.

EVIDENCE.—NOTICE OF PROTEST, SERVICE OF.

The original entries in the protest-book of a notary, who is dead, are proper evidence to show demand and notice of non-payment, and such entries should be admitted by the court (3 *R. S.* 5th Ed. 474, § 36).

When the word "mailed" appears in a memorandum in the official register of a deceased notary, it is consistent with reason and the meaning of the term, to presume that it describes what that act in its ordinary performance calls for, *i. e.*, placing a letter in the post-office, *with postage prepaid*, to be delivered under public authority.

Opinion of the Court, by CURTIS, Ch. J.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided February 4, 1878.

Appeal by the defendant from a judgment for \$5,857.93, entered upon a verdict in plaintiff's favor.

The action was brought against the defendant as the indorser of two promissory notes.

The answer denies due notification of protest.

Fellows, Hoyt & Schell, attorneys, and *James Otis Hoyt*, of counsel, for respondent.

E. Haines, for appellant.

BY THE COURT.—CURTIS, Ch. J.—The only question raised by the pleadings is, whether the defendant was duly notified of the dishonor of the notes. At the trial, the notary being dead, the register of official acts kept by him was produced, and the following entries therein, relating to the mailing to the defendant of notices of protest of the notes in suit, made under his direction, and signed by him, were read in evidence :

2554	<p>1873, Nov. 25. At the Banking House of Geo. Opdyke, to a clerk. Payment refused. JOHN C. HICKIE.</p>	<p>Nov. 26. Theo. De Groot mailed notice at 142 Fulton St., N. Y. City. LOUIS FELLOWS.</p>
25688	<p>1873, Dec. 29. At the Banking House of Geo. Opdyke & Co. to a clerk. "No acct." JOHN C. HICKIE.</p>	<p>Dec. 30. Theo. R. B. De Groot mailed notice at 142 Fulton St., N. Y. City. LOUIS FELLOWS.</p>

Opinion of the Court, by CURTIS, Ch. J.

The defendant objected that this was not the best evidence, but secondary and hearsay, and excepted to its being read in evidence. The provision of the statute which sustains the ruling of the court is as follows :

“ Any note or memorandum made by a notary public in his own handwriting, or signed by him at the foot of any protest, or in a regular register of official acts kept by him, shall, *in the case of his death* . . . be presumptive evidence of the fact of any notice of non-acceptance or non-payment having been sent or delivered at the time and in the manner stated in such note or memorandum ” (3 R. S. 5th Ed. 474, § 36 [47]).

It was not the intention of the legislature, in framing this beneficent and wise enactment for the protection of those who might be subjected to the loss of their legal rights against indorsers, in case of the death of a notary, that its application should be so limited, as to deprive it of its value and usefulness. If it was intended that it should be construed narrowly, the general words, “ any note or memorandum made by a notary,” would not be made by the statute presumptive evidence of the fact of a notice of non-payment having been sent at the time and in the manner stated in such note or memorandum.

In corroboration and explanation of the memoranda of the notary, it was proved at the trial, and without objection, that the notices of protest were put in envelopes and directed to the defendant at his place of business, No. 142 Fulton street, New York city, and delivered thus enclosed and directed to the notary, whose custom it was to mail such notices in the general post-office of the city of New York.

At the trial, the defendant did not testify that he failed to receive the notices of protest of the notes.

The defendant objected that there was no evidence that the notices were sealed up and postage prepaid, and when and where they were put in the post-office.

Appellant's points.

order, and said sum not having been paid, the court granted the order appealed from (both of the previous orders being still in force), enjoining said receiver from collecting or receiving the moneys deposited in bank by him as such receiver, and restraining and enjoining the receiver of the said bank from paying said sum to the receiver herein, and directing payment to said attorney.

Held, a proper exercise of the power of the court (*People v. Rogers*, 2 *Paige*, 103; *Code of Civ. Pro.* § 1241).

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided February 4, 1878.

Appeal of Thomas J. Barr, receiver, from an order respecting proceeds of property that came into his possession as receiver and were deposited in the Bowling Green Savings Bank, of which Sheppard F. Knapp, Esq., is receiver.

James Henderson, attorney, and *Henry C. Dennison*, of counsel, for appellant, urged:—I. The court had no power to grant the order of injunction appealed from on the application as made by the respondent. (a.) An order of injunction can only be granted by the court when it appears “from the complaint” that the plaintiff is entitled to a judgment against the defendant, restraining the commission or continuance of which, “during the pending of the action,” etc. (*Code of Civ. Pro.* § 603). (b.) The respondent presented no complaint, and therefore the granting of the injunction was without authority. Nor was there any action pending, as judgment of discontinuance of this action had been entered long prior to the granting of the same. The order could only be granted “before final judgment” (*Code*, § 608). (c.) Even a defendant to obtain an injunction order must serve a complaint in the nature of a cross suit (*Thursby v. Mills*, 1 *Code R.* 83).

II. The order appealed from tends to enjoin the ap-

Respondent's points.

pellant from exercising the duties of his office as receiver. Such an injunction cannot be granted (*People v. Sampson*, 25 *Barb.* 254).

III. The order appealed from incapacitates the appellant from complying with the order of April 16, directing payment of the money in question, or purging himself of contempt under the order of August 7, 1877. (*a.*) The order enjoins the appellant from collecting or receiving moneys deposited by him as receiver in the Bowling Green Savings Bank. How can he then pay the fine imposed under the order of August 7, 1877? The order in effect enjoins the appellant from doing that which he is directed to do under the order of Mr. Justice SANFORD.

IV. The respondent is not entitled to both the property and body of the appellant.

George N. Titus, respondent, urged:—I. This receiver is not “a party aggrieved,” by the order of December 3, 1877, and has no right of appeal therefrom. For that cause, his appeal should be dismissed. He is not a party to this action, nor the representative of a party. He is the mere instrument of the court (*Cory v. Long*, 43 *How. Pr.* 492; *Martin v. Kanouse*, 2 *Abb. Pr.* 392; *Matter of Bristol*, 16 *Id.* 398). and has no right to be heard upon any point embraced in that order (*Tallman v. Hinman*, 10 *How.* 89). “It is too clear for doubt, that a receiver has no right to intermeddle in questions affecting . . . the disposition of the property in his hands, or to any extent to be regarded as the representative of any one or more of the parties to the cause” (*Matter of Colvin*, 3 *Md. Ch. Dec.* 300, 302, 303).

II. The respondent's lien upon this reserved property and its proceeds—his right to payment therefrom by this receiver, and his contempt of the court in refusing to make such payment, have been adjudged. A

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J.—Thomas J. Barr,
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nation of the rights of parties and claimants (*People v. Rogers*, 2 *Paige*, 103 ; § 1241, *New Code*).

There is nothing in the papers that shows that the order appealed from incapacitates or hinders the receiver from complying with the order of April 16, 1877, directing the payment to the respondent of the proceeds in question, or purging himself of the contempt of which he was adjudged guilty, August 7, 1877. The order appealed from was not made until December 3, 1877, and long after such disobedience and adjudication, and was made simply for the preservation and due application of such remaining portion of the fund as had not been drawn out and received by the appellant from the representative of the Bowling Green Savings Bank.

The order appealed from should be affirmed with costs.

FREEDMAN, J., concurred.

JAMES PURSELL, PLAINTIFF AND APPELLANT, v.
THE MAYOR, &c. OF NEW YORK, DEFEND-
ANTS AND RESPONDENTS.

VOID ASSESSMENTS, RECOVERY OF.

In the present case the plaintiff, the tenant of certain premises upon which an assessment had been laid, not having received notice to pay, and not being himself the person assessed or liable to have his goods levied upon, and being under no legal obligation towards his landlord to pay this assessment, void upon its face, apparently without the knowledge or request of his landlord, for the purpose of obtaining a loan by mortgage upon his lease, voluntarily and without protest or inquiry, paid the same. At the time of said payment, proceedings to vacate the assessment were pending on the part of the landlord without the tenant's knowl-

Opinion of the Court, by CURTIS, Ch. J.

edge, and the same was vacated subsequent to the payment thereof by the tenant.

Held, that the tenant could not recover the moneys so paid by him; that the present case differs from *Peyser v. Mayor*, recently decided in the court of appeals, reversing the decision of the general term, 8 *Hun*, 413.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided February 4, 1878.

Appeal by the plaintiff from a judgment rendered in favor of the defendants, upon a trial by the court, dismissing the complaint.

The action was to recover moneys paid by the plaintiff to the defendants, to discharge an assessment upon premises, of which the plaintiff was tenant, and which the plaintiff claimed by the terms of his lease he was required to pay.

The defendants set up by answer, that the assessment was paid voluntarily on May 10, 1873. It appears that on August 22, 1872, the landlord instituted proceedings to vacate the assessment, and it was set aside as illegal and void on May 19, 1873. The plaintiff did not know of the pendency of these proceedings when he paid the assessment.

William Henry Arnoux, for appellant.

D. J. Dean, for respondents.

BY THE COURT.—CURTIS, Ch. J.—This case differs in some respects from that of *Peyser v. Mayor, &c. of N. Y.*, recently decided in the court of appeals, and reversing the decision of the general term reported in 8 *Hun*,

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413. In the present case the plaintiff testifies, that he would not have paid these assessments, if it had not been required in order to obtain a loan upon a mortgage of his lease ; that no notice was given him by the city to pay them, or warrant for their collection served upon him that he was aware of. As far as can be gathered from the evidence, it appears that the city had failed to advertise the proceedings to impose the assessments, and that they were laid without jurisdiction or authority. These defects must have been apparent on the face of the record, and probably constituted the ground on which they were vacated. Again, as these assessments were laid against the plaintiff's landlord only, the owner in fee by name, no warrant could issue to collect the assessment by levy, except against the goods of the landlord, the person assessed.

The law does not favor the theory, that a person may without inquiry and without resistance pay a demand made upon him in good faith, and then, at a future time, when his opponent may be perhaps without evidence, sue to recover back the money paid on the ground that the original demand was illegal.

However equitable and just it may seem at the first glance, that restitution should be compelled under such circumstances, the protection of the general welfare of the public requires that the person upon whom the demand is made should make a reasonable inquiry as to the nature and basis of it, and then resist it, unless he is satisfied of its legality or is compelled by coercion in fact or law to pay it involuntarily. The enforcement of this principle tends to lessen litigation, and, as far as it relates to payments of taxes and assessments, is of vital consequence to municipal corporations. A departure from it tends to relax that jealous inquiry and watchfulness with which those who contribute the payment of public imposts should guard their own rights. When hundreds of persons prefer

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to pay their share of a void assessment without inquiry or examination, leaving to some one else to examine it and have it vacated, intending as soon as it may be vacated to sue and recover back from the municipal corporation what they have paid, a great injury to the individual and to the public is fostered. Oppressive and unnecessary assessments, under such circumstances, are silently and without restraint or watching, imposed upon the public, and when vacated by the courts in the interest of justice at the action of some one resisting party, a multitude of suits are brought to recover back moneys that have been paid without inquiry and without resistance and to the public loss.

It is in strict accordance with equity and justice, and that too, in behalf of the individual as well as the public, that the exercise of some degree of watchfulness, of inquiry and of resistance in respect to the imposing and collecting of assessments should be required of the person illegally assessed, and that something more should be required than to simply pay it, and then to recover it back with the additional burden of costs, to be paid by the public.

In the present case the plaintiff, without notice to pay, and not himself the person assessed or liable to have his goods levied upon, and under no legal obligation towards his landlord to pay this assessment, void upon its face, and without the slightest inquiry or resistance, and apparently without the knowledge and request of his landlord, but purely and simply to obtain an advantage personal to himself in procuring a loan by a mortgage on his lease, sends voluntarily and pays it willingly and without any objection or dissent.

In these last enumerated circumstances the case appears to vary from that of *Peyser v. Mayor, &c.* It would be inconsistent with the views expressed, and the principles carefully considered by the learned judge rendering the opinion of the court of appeals in

Statement of the Case.

that case, to sustain the claim of the plaintiff to recover in this action.

The judgment appealed from should be affirmed, with costs.

FREEDMAN, J., concurred.

JOHN PRENTICE, PLAINTIFF, v. THE KNICKERBOCKER LIFE INSURANCE COMPANY, DEFENDANT.

LIFE INSURANCE.

In this case the provisions of a life insurance policy, which declared the claim thereunder forfeited, unless the owner of the policy should, upon the death of the insured, forthwith notify the company in writing, &c., of the fact, indicating the nature of the proof of death, to be furnished, and unless full proofs should be presented within twelve months from the time the loss occurred, —were

Held inoperative on the following grounds: The general agent of the company, an officer authorized to make such representations, stated to the owner of the policy, upon his departure for Europe, and upon his offer to pay certain premiums which would become due in his absence, that the company had agents who would know of the death of the insured before the owner could, "and that there was no trouble at all in regard to the whole thing."

The insured died some time after the return of the owner of the policy, but the fact of his death did not come to the knowledge of the owner till more than twelve months thereafter, and the above provisions of the policy were not complied with. The premiums were regularly demanded by the company and paid in good faith by the owner, after the death of the insured, and until the owner's knowledge thereof.

Held also, that the owner could recover the premiums paid as above.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided February 4, 1878.

Statement of the Case.

Motion for judgment on a verdict directed for plaintiff subject to the opinion of the court at general term.

The action is upon a policy of insurance issued by the defendant, bearing date August 10, 1867, whereby it insured the life of Edwin W. Mitchell, in the sum of \$5,000, for his own benefit, upon certain terms and conditions which were therein specified. The policy was assigned to the plaintiff December 9, 1867.

Upon the back certain conditions were printed, which by the terms of the policy are made "part and parcel thereof." One of these conditions prescribes that the company shall be notified forthwith in writing at the office in New York, by the policy owner, of the death of the person whose life is insured, and indicates the kind of proof of the death of the assured which shall be furnished to the company, and another declares that "full proofs shall be presented within twelve months from the time the loss occurs, or the claim will be forfeited."

Mitchell died at Montclair, N. J., on July 27, 1873. On August 10, 1873, and again on August 10, 1874, the plaintiff, in ignorance of such death, paid to the defendant the premium which would have been payable on those dates, respectively, had Mitchell then been living, and continued the policy in force. The company received these payments in ignorance of his death. No notice of Mitchell's death was given to the company until the latter part of June, 1875, when plaintiff first heard of his death, and no proofs of death in conformity with the conditions of the policy, or otherwise, were furnished to it until July 9, 1875, and no objection was made until October, 1875.

The answer of the defendant admits the issuing of the policy, the death of Mitchell while it was in force, and the payment of two annual premiums after his

Defendant's points.

decease ; but it avers that the company received the two payments, and issued the usual renewal receipts therefor in ignorance of his death, fully believing that he was then alive, and that no notice or proof of his death was submitted to, or received by it, until more than twelve months after his death. It also admits demand of payment of the sum insured by the policy, and of the two premiums paid as above stated, and that the same have not been repaid, but it avers an offer to return said two premiums, and a willingness to return the same. In 1872 the plaintiff was informed by the general agent of the company, C. L. North, with whom had been all his dealings, that there would be no trouble about the question of repayment of premiums in regard to Mr. Mitchell dying prior to the time the premiums became due. He said to the plaintiff that the company had agents who would know of the death before he could, and that in case he advanced any money it would be returned ; and that there was no trouble at all in regard to that whole thing.

On the trial, the court directed a verdict for the plaintiff for the sum insured with interest, and the two premiums with interest, subject to the opinion of the general term.

Johnson, Cantine & Deming, attorneys, and *Henry W. Johnson*, of counsel, for defendant, urged :—I. The matter printed on the back of the policy constitutes a part of the contract of insurance, and the same effect must be given to it that it would have if incorporated in the body of the instrument (*Worsley v. Wood*, 6 *T. R.* 710 ; *Mut. Benefit Life Insurance Co. v. Miller*, 2 *Ins. L. J.* 109 ; *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 *Denio*, 75 ; *Patch v. Phoenix Mut. L. Ins. Co.*, 44 *Vt.* 481 ; *Brawnstein v. Accidental Death Ins. Co.*, 2 *Bigelow*, 610 ; *Bliss on Life Ins.* § 58 and note).

Defendant's points.

II. From the language of the policy it is manifest that three things must concur to make the liability of the company absolute, viz: 1st. The death of the person whose life is insured. 2nd. The giving of due notice and the presentation of proofs of such death, in accordance with the requirements of the policy. 3rd. The lapse of three months from the time such proofs are presented.

III. The conditions printed on the back of the policy embrace two requirements in regard to proofs of death: 1st. That they shall contain as particular an account of the cause, time and place of death and the circumstances attending the same as the nature of the case will admit, &c., &c. 2nd. That these proofs shall be presented to the company within twelve months after the death occurs.

IV. The limitation of time within which the proofs of death must be presented is a valid and binding stipulation, and a compliance with it is a condition precedent to a right of action on the policy. There is no difference in principle between this condition and a condition in a policy of fire insurance limiting the time within which an action must be brought, or in a life insurance policy limiting the time within which it must be surrendered to entitle the holder to a "paid up" policy, or in a policy of insurance against accidents limiting the time within which proof of the accident must be furnished, or in a life policy requiring proofs of death to be presented, but without limiting the time of their presentation. In such cases it has been expressly held that the condition must be complied with, or the plaintiff cannot recover (*Bliss on Life Ins.* 2d Ed. 600; *May on Insurance*, 583; *Riddlesbarger v. Hartford Ins Co.*, 7 *Wall.* 386; *Roach v. N. Y. and Erie Ins. Co.*, 30 *N. Y.* 546; *Ripley v. Ætna Fire Ins. Co.*, *Id.* 136; *Ames v. N. Y. Union Ins. Co.*, 4 *Kern.* 255; *Smith v. Conn. Mut. Life Ins.*

Defendant's points.

Co., 4 *Bigelow*, 421 ; *Schumacher v. Manhattan L. I. Co.*, 3 *Ins. L. J.* 455 ; *Gamble v. Accident Assurance Co.*, 4 *Irish R.* 204 ; *O'Reilley v. Guardian Mut. Life Ins. Co.*, 60 *N. Y.* 169).

V. It is clearly no excuse for a failure to present proofs of loss within twelve months, that the plaintiff was ignorant of the death of the party whose life was insured. The requirement in the conditions is absolute as to time, and the time begins to run from the occurrence of the death, and not from the time the beneficiary has knowledge of the fact. It would have been entirely competent for the parties to have agreed that this period should not commence to run until knowledge of death was brought home to the beneficiary. But such is not the contract ; and for the court to so interpret it would be doing violence to its plain terms, and might wholly deprive the defendant of the benefit of the stipulation.

VI. The plaintiff's counsel on the trial treated the case as one involving a question of forfeiture merely. A party cannot forfeit a right of action which he has never acquired. From what has already been stated it is clear that the right of action upon the policy does not accrue until three months after proofs are furnished according to the terms of the contract.

VII. The plaintiff, on the trial, in support of the allegations in the complaint that the defendant, on August 10, 1873, and also on August 10, 1874, by its agreement duly made, for value received continued the said policy in force for a period of one year from those dates respectively, introduced the renewal receipts given on those dates. It is alleged in the answer, and was proven on the trial, that these renewal receipts were given in ignorance of the death of Mitchell. But whether this were so or not, they could not have the effect to continue the policy in force after his death. The company could not insure a life which did not exist.

Plaintiff's points.

(Simpson v. Accidental Death Ins. Co., 2 *C. B. (N. S.)* 257; Lafavour v. Ins. Co., 1 *Phila.* 558; 2 *Bigelow*, 158).

W. P. Prentice, of counsel, for plaintiff, urged:—
I. No defense is attempted on the merits, and it appears from the admissions of the defendant that it has had no injury from any delay on plaintiff's part. Therefore it cannot now be permitted to avail itself of a purely technical defense to avoid its contract by claiming as a breach of condition entitling it to a forfeiture the omission to file full proofs of death within twelve months after the death of the insured, when it appears that such omission was induced by its own acts and representations.

II. As to doctrine of forfeiture, waiver, &c., applicable to this case, see *Stokes v. Recknagle*, 38 *Superior Ct.* 383; *Moses v. Bierling*, 31 *N. Y.* 464; *Leslie v. Knickerbocker Ins. Co.*, 63 *N. Y.* 27; *Stolle v. Ætna F. & M. Ins. Co.*, 6 *Ins. L.* 784; *Hermann on Estoppel*, 433; *Carpenter v. Sillwell*, 12 *N. Y.* 73; *Isham v. Buckingham*, 49 *Id.* 216; *Home Life Ins. Co. v. Pierce*, 5 *Bigelow*, 100; *Mayor v. Hamilton Fire Ins. Co.*, 39 *Id.* 46. The condition claimed by the defendant is a condition subsequent, not precedent (*Hincken v. Mut. Ben. Life Ins. Co.*, 6 *Lans.* 21; 50 *N. Y.* 657). It is qualified by the preceding condition, the 6th, that: "As soon as possible a particular account of the cause, time and place of death, and the circumstances attending the same, as the nature of the case will admit," should be delivered to the company. This condition was in an obscure place, on the back of the policy, and notice was not, as matter of fact, brought home to the plaintiff (*McNeilly v. Continental L. I. Co.*, 66 *N. Y.* 24). Time is not to be deemed of the essence of the contract, because contrary to the intention of the parties and only to be assumed from doubtful terms

Plaintiff's points.

(Dillon v. Masterson, 39 *Superior Ct.* 133). Every intendment and fair and legitimate presumption is for the plaintiff (Fairfax v. N. Y. C. R. R., 40 *Superior Ct.* 128). Conditions subsequent are not favored in law, and "a vigorous exaction of them is a species of *summum jus* in many cases hardly reconcilable with conscience." Therefore it is that all the circumstances are to be taken into account; and as it appears the defendant has had no injury, the failure of notice can not work a forfeiture (Hoag v. McGinnis, 22 *Wend.* 163; Bumstead v. Dividend Mut. Ins. Co., 12 *N. Y.* 81; Bradley v. M. Ben. L. Ins. Co., 45 *N. Y.* 422; 2 *Pars. Cont.* 662; 4 *Kent Com.* 129; Georgia Home Ins. Co. v. Kinnier, Sup. Ct. of Virginia, *Ins. L. Journal*, 497). In Southern Life Ins. Co. v. Wilkinson, 5 *Big. Ins.* 75, it was held not error for the court to refuse to charge that a delay for several months to give notice of the death was a failure to give notice in a reasonable time. In Pennell v. Chandler, 5 *Ins. L. J.* 108, held that notwithstanding there was no formal proof filed, plaintiff was entitled to have his claim (See Carter v. Scargill, 10 *Q. B.* 564).

III. The defendant agreed to continue the contract until August 10, 1875, and received its payments therefor; it was therefor immaterial when it received proofs of death, if only prior to August 10, 1875, as was the case (Mayor, &c. v. Hamilton Ins. Co., 39 *N. Y.* 45; Mix v. Andes Ins. Co., 9 *Hun*, 399; Ames v. N. Y. Union Ins. Co., 14 *N. Y.* 253).

IV. If it be held that the final condition on the back of the policy,—*i. e.*: "Full proofs shall be presented within twelve months from the time the loss occurs, or the claim will be forfeited,"—is still binding and the acts of the defendant in the representation of the general agent in the notices to pay premiums in 1874 and 1875, and in continuing the contract of insur-

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ance upon the terms of the renewal, do not constitute a waiver on defendant's part; still the question remains, viz: was not this condition a penalty to be construed as that in *Hoag v. McGinnis*, 22 *Wend.* 163, or in *Dakin v. Williams*, 17 *Wend.* 447, or in *Devins v. Cummins*, 3 *Johns.* 299, and the defendant left to set off any damages it may have sustained? In *Bumstead v. Dividend Mut. Ins. Co.*, 12 *N. Y.* 81, it was held that such conditions in a policy need not always be complied with. So, in the case of a guarantee, it has been said that although notice to the guarantor be delayed for a long period—for months, and possibly for years—and it was nevertheless clear that the guarantor could have derived no benefit from an earlier notice, the delay would not impair his obligation (2 *Pars. Cont.* 662, and cases cited).

BY THE COURT.—CURTIS, Ch. J.—The agreement between the parties to the policy required that in case of the death of the person insured, notice in writing should forthwith be given to the insurer, and further that full proofs be presented in twelve months from the time the loss occurs, or the claim would be forfeited. Payment by the company was conditioned upon compliance with these requirements of the policy.

If persons choose to enter into contracts of this nature, and subject to these conditions, it is no reason, because hardships and loss result, that courts should disregard well-established legal principles in interpreting and enforcing them. Where parties have distinctly agreed, their contracts must be sustained and performed (*Foot v. Ætna Life Ins. Co.*, 61 *N. Y.* 571; *Ritzler v. World Ins. Co.*, 42 *N. Y. Super. Ct.* 409).

The position of the defendants,—that the non-compliance of the plaintiff with these conditions of the policy, exonerates them from liability to pay the loss,—

is tenable, unless by some act on their part, they have made these conditions inoperative.

The testimony shows that the plaintiff had two other policies on the life of the deceased, one of \$5,000 and one of \$2,500, that he dealt entirely with the general agent of the defendants, and who as such indorsed the checks drawn by plaintiff for premiums to the defendant's order. The plaintiff, in answer to a question, asking him if, at any time prior to 1874, he had any conversation with the officers of the defendants, or their representatives, in relation to notices or proofs of death, testified as follows :

"I had, with the general agent, C. L. North, in 1872, two or three days before I went to Europe ; as there were three policies which came due within the next six weeks subsequent to the time of my going away I spoke to him on the subject ; he said in regard to paying them in advance, that there was no trouble about that. I raised the question in regard to Mr. Mitchell dying prior to the time the premiums became due ; he said that the company had agents who would know of the death before I could, and that in any case, if I advanced the money, it would be returned, and that there was no trouble at all in regard to that whole thing ; I went to Europe on July 3, 1872 ; I returned in the latter part of October, 1872."

After the decease of the insured, in 1873, the defendants continued to call upon the plaintiff for two years, by notices, to pay the annual premiums upon the policy, which he did.

Here was a statement made to the plaintiff, when about to leave for Europe, by the general agent of the company, that by its terms and language would naturally throw the plaintiff off his guard in watching the life of the deceased. The statement that the company had agents who would know of the death of the insured before the plaintiff would, "and that there

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was no trouble at all in regard to the whole thing," was equivalent to saying, "we shall know about his death before you, and in ample time, and there is no occasion to give yourself any trouble about it."

It was reasonable, and perfectly consistent with these representations, that the plaintiff should feel that he need not deal with the company thereafter, at arm's length on this point, and that he should respond to their calls for the annual premiums. It is not disputed by the defendants, that this representation was made to the plaintiff, and that thereafter he should continue his payments on all these policies without further inquiry in response to their call, is indicative of his reliance upon it. The evidence does not show that the company had such agents as the general agent represented to the plaintiff they had.

The question arises as to which party under these circumstances shall bear the loss. It would be manifestly unjust that the defendants should mislead a policy owner by their representations, into the omission of an act by which the policy became forfeited, and that they could profit by their own breach of faith. It was said upon the argument, that this case was "*sui generis*, and that never before was there such an experience on the plaintiff's or defendant's part." The concurrence of facts presented may be new, but the principle of law to be invoked and applied is familiar and elementary.

There also appears to be an experience on the defendant's part in *Leslie v. Knickerbocker Life Ins. Co.* (63 N. Y. 27), quite analogous to the present. In that case the plaintiff's agent, not knowing when the premium fell due, applied before default at defendant's office, to a person standing at the cashier's desk, to ascertain it; this person did not give the information, but promised to send notice. This promise was not performed, and the company claimed, when he again

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called, which was after the premium fell due, that the policy had in the interval elapsed. The defense of the company was not sustained, the court saying, *per* FOLGER, J., that even if there was no primary hostile purpose in the action of one, who may in a certain event, become entitled to a forfeiture or other right arising from the non-performance of a condition, if by his act he has induced another to omit strict performance, he may not take the benefit or exact the forfeiture.

This principle is conclusive in governing the present case, unless there was a lack of authority on the part of the general agent to make the representations that he did to the plaintiff, in respect to notice of the death of the insured. Although the second condition of the policy declares void certain acts unless signed by the president and secretary, it does not extend to representations made by its general agent. No claim was made on the argument that the general agent had acted beyond the scope of his authority. There is nothing in the case to show that the policy owner had reason to suppose that the general agent of the company, with whom he had all his transactions, and who indorsed the checks drawn by him to the order of the company, had powers other or different from those he assumed to have and exercised.

Judgment should be ordered for the plaintiff upon the verdict, with costs.

FREEDMAN, J., concurred.

Statement of the Case.

**RICHARD ROBBINS, ET AL., PLAINTIFFS AND
APPELLANTS, v. JOHN H. FALCONER, DE-
FENDANT AND RESPONDENT.**

**ORDER OF ARREST.—CODE OF PROCEDURE, § 179.—PRIN-
CIPAL AND AGENT.**

If according to the averments of a complaint, the plaintiff may have judgment, without proof of any facts which justify an order of arrest under section 179 of Code of Procedure, the court is not precluded from vacating an order of arrest on the ground that the cause of action and the grounds of arrest are identical.

Section 179 of the Code of Procedure does not apply to a case where, by agreement between principal and agent, the agent may use the principal's money as his own, so far as the legal title to it is concerned, while he promises to pay the amount on demand,—i. e., when the agreement contemplates the relation of debtor and creditor,—but only to a case where the obligation of the agent is to return the identical money or its traceable proceeds to the principal (*McBurney v. Martin*, 6 *Robt.* 502).

The mere fact that one is an agent to sell and to receive the proceeds does not make him liable for a tort in case he does not pay over the proceeds on demand, after those proceeds have passed from the specific form in which they were received and have been commingled with the agent's own money. While they remain in the specific form, the principal may become entitled to their possession upon demand. Unless such is the case, to make the agent liable to hold the specific proceeds for the principal, there must be allegations to show that such was his special obligation.

In this case, in view of the above principles, the court *held*, that the order vacating order of arrest, should be affirmed.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided February 4, 1878.

Appeal from order, setting aside order of arrest.

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The complaint was, "that heretofore, to wit, on February 23 and 27, and March 19, 1877, at the city of New York, these plaintiffs, who were and now are co-partners doing business under the name and style of Robbins, Bodington & Company, did authorize and empower the defendant as their confidential agent to sell for them in the city of New York, foreign bills of exchange, and that on the dates aforesaid the defendant did sell in the city of New York, for and on account of the plaintiffs and belonging to them, three bills of exchange, of the aggregate value of \$15,107.36, which sum defendant then and there received as the proceeds of such sale.

"That afterwards the defendant paid over to these plaintiffs on account the sum of \$13,000, but the further sum of \$2,107.36, the balance of the aforesaid proceeds of sale, he has neglected and refused to pay over to these plaintiffs, though often requested by them so to do.

"Wherefore the plaintiffs pray."

The order of arrest was made upon the complaint and the affidavit of an agent of plaintiffs, stating that the plaintiff entrusted to the defendants three bills of exchange, of the aggregate sum of \$15,107, that when the bills "were given to defendant by the plaintiffs, the defendant undertook and agreed for a compensation to be paid to him, to sell the same for cash in the city of New York, and when sold to remit the proceeds thereof to the plaintiffs at Beaufort, South Carolina, either by immediate remittance, or by honoring and paying at sight, drafts to be made on him by the plaintiffs against such proceeds;" that the defendant did sell the bills, and obtain, on their sale, the sum of \$15,107, of which he remitted \$13,000 and no more, but that the balance the defendant "refuses to pay to the plaintiffs on their request which has been frequently made, that defendant admits that above money was collected by him, but

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that he says "that he has appropriated the same to his own use, by commingling it with money" of his own, and that he no longer has it to pay to the plaintiffs," that said bills "were entrusted to the defendant in the trust and confidence reposed in him, that he would faithfully preserve and remit to these plaintiffs, their proceeds, when sold."

The defendant after his arrest moved to set aside the order, upon the complaint and affidavit above set out, and the affidavit of the defendant, stating that the defendant denies that plaintiff entrusted to him the bills with any understanding that deponent was to remit immediately the proceeds thereof, or that the bills were entrusted to the defendant in the trust and confidence reposed in him, under his promise that he could faithfully preserve and remit their proceeds, or under any other conditions than those stated in the affidavit; that plaintiffs had sent other bills to defendant for sale, before February 6, 1877, and that up to that date the defendant had been in the habit of depositing the proceeds of such other bills in the Bank of British North America in New York, to the credit of the plaintiffs, but that after that date, that bank refused to carry the account any longer, and thereafter defendant, "at the request of plaintiffs, acted as banker for the said plaintiffs and retained the proceeds of their draft on deposit in his own account, and gave them credit therefor on his books; that it was agreed by both parties that the defendant should have the right to deposit said money in bank in his own name, as any other banker or broker would do; that in the course of their dealing, plaintiffs drew for more than was to their credit with defendant, that at other times they allowed their money to remain deposited with defendant for considerable period of time; that, on February 24, 1877, the plaintiffs sent to defendant their letter annexed to the affidavit, which letter enclosed two bills, and directed defendant "Please

Appellant's points.

sell at best rate and place proceeds to our credit with you ;" that the proceeds of these bills was the sum of \$5,380.67, mentioned in complaint ; that on March 8, 1877, the plaintiffs wrote another letter annexed to affidavit, advising a draft upon defendant of \$2,000, and saying, "From this date we propose advising you, whenever we find it necessary to draw upon you ;" that on March 19, 1877, there was to the credit of plaintiffs with defendant \$574.55, all other proceeds having been paid to plaintiffs ; that on March 19, 1877, the plaintiffs sent the bills the proceeds of which, as sold by defendant, amounted to the sum (stated in the affidavit of plaintiff's agent), of \$7,533.31 ; that defendant deposited that amount in bank to his own credit, and immediately notified the plaintiffs of the sale and the proceeds ; that on March 22, 1877, plaintiffs drew on defendant for \$6,000, which was paid by defendant's check on his bank ; that afterwards, until March 26, the plaintiffs made no further draft, and on that day the defendant was obliged to suspend payment and made a general assignment for benefit of his creditors.

The court vacated the order of arrest, and plaintiffs appeal.

Edward D. McCarthy, attorney, and of counsel, for appellants, urged :—I. This case is distinguishable from the two cases cited on argument (40 *N. Y.* 124 ; 51 *Id.* 594) ; both of which were actions for money had and received. The nature of the action can be determined by the complaint only. On the trial of this action, unless a conversion is proved (a trover of property), the complaint will fail and the action will be dismissed. Proof that would make out a good cause of action for money had and received, will not maintain this cause of action. That this cause of action is identical with the ground of arrest, will not be doubted.

Respondent's points.

The cause of action is in tort for conversion of property.

II. It is the settled law of our courts, that in such a case as this, an order of arrest will not be vacated upon affidavits (*Stuyvesant v. Bowran*, 34 *How.* 51 ; *Barret v. Gracie*, 34 *Barb.* 20 ; *Solomon v. Waas*, 2 *Hill.* 179 ; *Geller v. Seixas*, 4 *Abb. Pr.* 103 ; *Frost v. McCarger*, 14 *How.* 131 ; *Ely v. Mumford*, 47 *Barb.* 629 ; *Merritt v. Hecksher*, 50 *Id.* 437 ; *Jaroslauski v. Sanderson*, 1 *Daly*, 232 ; *Merwin v. Playford*, 3 *Rob.* 702 ; *Swift v. Wylie*, 5 *Id.* 680 ; *Nelson v. Blanchfield*, 54 *Barb.* 630).

III. The case stands thus : By the complaint and plaintiffs' affidavit a cause of action, *ex delicto*, is alleged. By the defendant's affidavit a cause of action, *ex contractu* only, is admitted. The general term of this court have held that this question, which decides "the capacity" in which defendant received money, and thereby became liable, cannot be tried on a mere motion (See *Swift v. Wylie*, 5 *Rob.* 684, and the cases there cited ; see also 3 *Id.* 703, see also cases cited under the second point).

IV. Nothing whatever appears in the affidavit of defendant to disprove our cause of action against him. No doubt if defendant were a general banker, with whom plaintiffs had had an account, he could not be held in trover for his failure or inability to make good a general deposit (46 *N. Y.* 84), but defendant's own affidavit admits that he was not a banker, because he says that he deposited the proceeds of our bills in a bank in the city of New York.

Carter & Eaton, attorneys, and *William B. Hornblower*, of counsel, for respondent, among other things, urged :—I. This is *not a case where the cause of action and the ground of arrest are identical*. Hence the court can and must decide this motion on

Respondent's points.

the preponderance of evidence, and is not bound by the technical rules which apply on a motion to vacate an order of arrest where the cause of action and the ground of arrest are identical.

II. The cause of action is founded upon an *indebtedness* from defendant to plaintiffs. The ground of arrest is that this indebtedness was created by defendant while acting in a *fiduciary capacity*. The allegations in the complaint as to this fiduciary capacity are *not traversable*, and even if the defendant did traverse them, there would be enough in the complaint untraversed to justify a recovery by the plaintiffs. That such allegations in a complaint are not traversable, and that they do not constitute part of the cause of action, is well settled (*Wood v. Henry*, 40 *N. Y.* 124; *Prouty v. Swift*, 51 *Id.* 594; *Republic of Mexico v. Arrangois* [Super. Ct. Sp. T., HOFFMAN, J.], 11 *How. Pr.* 1; *Liddell v. Paton*, 7 *Hun*, 195; *affi'd* by Ct. of App. [not yet reported]).

III. This is *not* an action *for conversion*. The court of appeals has repeatedly held that an action for conversion cannot be maintained in such a case as this (*Walter v. Bennett*, 16 *N. Y.* 250; *Conaughty v. Nichols*, 42 *Id.* 83; *Greentree v. Rosenstock*, 61 *Id.* 583; *Vilmar v. Schall*, 61 *Id.* 564; *Austin v. Rawdon*, 44 *Id.* 63).

IV. The *burden of proof is on plaintiff* in an application to vacate an order of arrest where the ground of arrest and the cause of action are different. If plaintiffs' evidence does not preponderate order must be vacated (*Allen v. McCrasson*, 32 *Barb.* 662; *Mecklin v. Berry*, 23 *How. Pr.* 380; *Hoy v. Duncan*, 33 *N. Y. Super. Ct.* 579; *Chapin v. Seeley*, 13 *How. Pr.* 490; *Union Bank v. Mott*, 6 *Abb. Pr.* 315; *Hernandez v. Carnobeli*, 10 *How.* 433; *Republic of Mexico v. Arrangois* [Superior Ct., Sp. T., HOFFMAN, J.], 11 *How.* 1;

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Mulrey v. Collett, 3 *Rob.* 716; Allen v. McCrasson, 32 *Barb.* 662).

V. But even if the cause of action and the ground of arrest were identical, the defendant could introduce affidavits in opposition to the papers on which the order of arrest was granted, and if the facts as they appear from the affidavits are such that the court would be justified in taking the case from the jury on the trial and directing a verdict for defendant, then the court must vacate the order of arrest. This was held in *Lorillard Fire Ins. Co. v. Meshural*, 7 *Robt.* 308; *Hoy v. Duncan*, 33 *N. Y. Super. Ct.* 555; *Farris v. Peck*, 2 *Sweeny*, 689; *Barritt v. Gracie*, 34 *Barb.* 20; *Merritt v. Hecksher*, 50 *Id.* 451; *Frost v. McCarger*, 14 *How. Pr.* 131; *Levins v. Noble*, 15 *Abb. Pr.* 131; *Stuyvesant v. Bowran*, 3 *Abb. Pr. N. S.* 270; *Royal Ins. Co. v. Noble*, 5 *Id.* 54; *Tallman v. Whitney*, 5 *Daly*, 505; *Griswold v. Sweet*, 49 *How. Pr.* 171. In *Elwood v. Gardner*, 45 *N. Y.* 349, the court of appeals appears to take the ground that in *all cases* the arrest may be vacated *upon the merits*, whether a nonsuit would be proper or not. See, to same effect, *Liddell v. Paton*, 7 *Hun*, 195.

VI. The rule is well settled that *an agent is not liable for conversion*, unless he was bound to pay over to the principal the *identical moneys* received by him for the account of the principal (*Walter v. Bennett*, 16 *N. Y.* 250; *Conaughty v. Nichols*, 42 *Id.* 83; *Greentree v. Rosenstock*, 61 *Id.* 583; *Vilmar v. Schall*, *Id.* 564; *Morange v. Waldron*, 6 *Hun*, 529; *Stoll v. King*, 8 *How. Pr.* 300; *Buchanan Farm Oil Co. v. Woodman*, 1 *Hun*, 641; *Bussing v. Thompson*, 15 *How. Pr.* 97; *Sutton v. De Camp*, 4 *Abb. Pr. N. S.* 484; *McBurney v. Martin*, 6 *Robt.* 502; *Goodrich v. Dunbar*, 17 *Barb.* 644; *Angus v. Dunscomb*, 8 *How. Pr.* 14). The phrase "fiduciary character" occurs in the bankrupt law with regard to debts which are not barred by discharge (*U.*

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S. Rev. St. §5117). In *Hervey v. Devereux* (72 *N.C.* 462), it is held that a general deposit of money subject to call did not constitute fiduciary relations. In *Grover & Baker Sewing Machine Co. v. Clinton* (5 *Biss.* 324), it appeared that defendants had been agents for the plaintiff in the sale of sewing machines, receiving a commission and accounting and paying over monthly. The court held that an authority *to mingle the money collected with the agent's own funds* might be fairly implied from the agreement to pay over monthly, and that the debt was therefore not of a fiduciary nature (U. S. Circ. Ct. West. D. of Wisc.; See *Woolsey v. Cade*, Sup. Ct. Ala. 15 *N. B. R.* 238; *Owsley v. Cobin*, U. S. Cir. Ct. S. Car., opinion by Chief Justice WAITE, 15 *N. B. R.* 489).

BY THE COURT.—SEDGWICK, J.—The first position of the learned counsel for appellants is, that the cause of action, stated in the complaint, comprises facts which justify arrest, under section 179 of Code of Procedure, and that if the affidavits disclose any facts to sustain it, the court below should have held the order of arrest, and not have determined the issues of this action, which a jury must decide.

The court of appeals definitely decided, having, at the time, section 288 in view, that a complaint which contained averments of enough facts to justify a verdict for plaintiff, irrespective of, and disregarding all averments of the complaint that could show a cause of arrest under section 179, did not state a cause of action, which of itself authorized arrest under that section. The substantial reason was, that the plaintiff would prove enough to justify a verdict, and the jury would not be called upon to say if the other and immaterial issues proffered by complaint, should be decided in plaintiff's favor.

Looking, then, at the complaint, we must see, if

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according to its averments, the plaintiffs might have judgment without proof of any facts which sustain an arrest under section 179. The complaint avers that the plaintiffs authorized and empowered the defendant, as their confidential agent, to sell for them the bills of exchange; that the defendant did sell them, and receive the proceeds; that he paid over a part of the proceeds, but refused to pay the rest of them, upon a demand by plaintiffs. It is manifest that nothing to sustain the power to arrest is stated, except it be that defendant was authorized and empowered to sell for plaintiffs as their agent. The word "confidential" agent does not affect the question.

But the mere fact that the defendant is an agent to sell and to receive the proceeds does not make him liable for a tort in case he does not pay over the proceeds on demand, after those proceeds have passed from the specific form in which they were received, and have been commingled with the agent's own money. While they remain in the specific form, the principal may become entitled to their possession upon demand. Unless such is the case, to make the agent liable to hold the specific proceeds for the principal, there must be allegations to show that that was his special obligation. In *Walter v. Bennett* (16 N. Y. 250), the plaintiff employed the defendant as his agent to sell pork, and the defendant did, as such agent, sell the pork, and receive the proceeds in a draft. He had this discounted, and the proceeds placed to his own credit. The plaintiff demanded the draft or the proceeds. The defendant refused to pay either. Judge BROWN said: "The relation between the parties rested in contract, for agency, under all the authorities, is a contract, expressed or implied. Whatever responsibility attaches to the defendant from his relation of agent, is upon the contract, and the plaintiff cannot change the nature of the defendant's obligation, and

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convert that into a tort, which the law deems to be a simple breach of an agreement." Judge JOHNSON said: "The duty of an agent for sale is to account for the proceeds of his principal's property; but he is not guilty of a conversion, if he does not deliver the specific proceeds to his principal" (Wood v. Henry, 40 N. Y. 124; Conaughty v. Nichols, 42 *Id.* 83; Prouty v. Swift, 51 *Id.* 594; Greentree v. Rosenstock, 61 *Id.* 583).

In this case, therefore, the judge, in deciding the motion, did not pass upon issues offered by the complaint and relating to a cause of arrest which a jury would thereafter be called to pass upon, and he was at liberty, and it was his duty, to examine the affidavits to determine the preponderance of the testimony disclosed by them.

The remaining question is, did the weight of the affidavits show a cause of arrest under the section? It would seem clear on the first impression, that this action was exactly under section 179, for money received by the defendant as a broker, but the section has been construed to mean, where the obligation on the part of the agent is to return the identical money or its traceable proceeds to the principal, and it does not apply to a case where, by agreement, the agent may use the money, when received, as his own, so far as the legal title to it goes, while he promises to pay the amount on demand,—*i. e.*, where the agreement contemplates the relation of debtor and creditor (McBurney v. Martin, 6 *Robt.* 502).

Giving a fair construction to the affidavit for plaintiffs, and sifting conclusion and opinion from fact, there is no inconsistency between it and other facts stated in defendant's affidavit which show that the relation of simple debtor and creditor existed when demand was made. But if there be a conflict, the circumstantial narration of defendant's affidavit, and the inference from

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the letters set out, produce a conviction that sustains the order made below.

The order is affirmed, with \$10 costs and disbursements to be taxed.

CURTIS, Ch. J., and FREEDMAN, J., concurred.

DAVID C. CARLETON, PLAINTIFF AND APPELLANT, v. THOMAS DARCY AND THE MAYOR, &C. OF NEW YORK, DEFENDANTS AND RESPONDENTS.

DISCONTINUANCE OF ACTION.—EJECTMENT.

The plaintiff's right to discontinue on payment of costs terminates when the action passes into judgment, for the defendant can then claim a right to the adjudication even if the same was wholly or partially unfavorable to him, and his right does not depend upon the judgment having been actually entered of record. It was enough that a point had been reached which made the action ready for judgment.

Leave to discontinue was never granted after a peremptory rule for judgment or demurrer.

After a special verdict, the plaintiff might discontinue by leave, as a matter of great favor, because the special verdict was not complete and final.

Leave to discontinue after a general verdict was never granted (2 *Williams Saunders*, 73).

In the case at bar, an action of ejectment, the judgment was entered, and execution issued, and plaintiff put in possession of the premises by the sheriff. Subsequently it was vacated, and another defendant added, but the plaintiff was allowed to keep possession of the premises under the execution until a judgment should be rendered in defendants' favor, and after answer of defendants denying plaintiff's right to possession of the premises, and claiming ownership in fee in the same, the plaintiff claims

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the right to discontinue on payment of costs without a restoration of the possession of the property.

Manifestly the plaintiff has no right in this condition of things to discontinue the action to enable him to bring a new action, or to compel the defendants to bring an action to recover the possession of the property now in the plaintiff under the judgment.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided February 4, 1878.

Appeal from an order, denying to plaintiff leave to discontinue upon payment of costs.

The action was in ejectment, and begun against Darcy alone. He failed to answer. The plaintiff entered judgment by default and issued execution to the sheriff, who delivered to him possession of the premises. On motion, the judgment was vacated. The mayor, &c., were joined as defendants, and both defendants were allowed to defend. The plaintiff was allowed to remain in possession. Answers were served denying plaintiff's title, &c. Thereafter, plaintiff moved to discontinue upon payment of costs. This motion was denied, and the order then entered appealed from.

H. O. Southworth and *T. B. Clarkson*, of counsel, for appellant, urged:—I. This is an application to discontinue a suit which plaintiff has a right to make and obtain *ex parte*, but defendant is heard by consent. The plaintiff has an undeniable right to discontinue his suit at any time before judgment (1 *Abb.* 46; 18 *Barb.* 595; 13 *How.* 258; 7 *Abb. N. S.* 37; 25 *How.* 356; 10 *N. Y.* 500; 11 *Hun.* 286; 10 *Id.* 120). As to right of appeal: 58 *N. Y.* 215. No case can be found where plaintiff has been denied the right to discontinue. No fact can be plainer than that a plaintiff cannot be compelled to prosecute a suit. This is the Code, and every decision under it. Neither the legislature

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nor court can compel a plaintiff to proceed in a cause. The court has never exercised any power over that right except to require a stipulation allowing defendant any right he has obtained to testimony, or on a counterclaim. This we have already offered to do, and tendered the stipulation and the costs, whatever they were, and are now willing to pay them. We don't want to be at the expense of several hundred dollars to carry on a lawsuit for their benefit, that they may see how much of a title they can make out. They say we are left in possession. Very well, we were in possession when they broke in, only thirty days before the action was commenced. They were notified of our rights, warned repeatedly not to trespass upon the property. Darcy entered, defying our rights, when we were in possession. Our judgment being opened and suit discontinued, there is nothing to prejudice an action of ejectment on their part. The shanty on the lot did not cost over \$30 ; we have expended \$300 on it, after obtaining judgment and supposed the case ended. Why should the city oppose the discontinuance ? If they have a title, let them proceed in their own right. The law allowing defaults to be opened does not affect the plaintiff's right to discontinue. He consents that the judgment remain vacated.

Wm. C. Whitney, attorney, and *T. B. Clarkson*, of counsel, for respondents, urged :—I. A plaintiff is not entitled, as matter of right, to discontinue his suit on payment of costs to the defendant. The court may in a proper case impose other or further terms, or both. The defendants claim that the true rule is that stated by Mr. Justice E. DARWIN SMITH, in his opinion in *Young v. Bush*, 36 *How. Pr.* 240–242. And this case was followed in a case at special term, which was affirmed on appeal to the general term of the fourth department (*Wilder v. Boynton*, 63 *Barb.*, 547. See

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also *De Barante v. Deyermant*, 41 *N. Y.* 355; *Cockle v. Underwood*, 3 *Duer*, 676, 678, 680; and *Leslie v. Leslie*, 10 *Abb. Pr. N. S.* 64-74). In a case in this court (above referred to) when defendant had set up a counter-claim which was not replied to, this court refused to permit plaintiff to discontinue on payment of the costs, on the ground that plaintiff showed no special reason for it (*Cockle v. Underwood*, 3 *Duer*, 676. See also, *Livermore v. Bainbridge*, 43 *How. Pr.* 272-274). The court of common pleas has imposed the payment of an allowance, in addition to the taxable costs, as a condition of permitting plaintiff to discontinue (*Tubbs v. Hall*, 12 *Abb. Pr. N. S.* 237). Where defendant had set up a counter-claim, and the case was partly tried, and plaintiff applied for leave to discontinue, and it appeared that an action on the counter-claim was barred by the statute of limitations, leave to discontinue was refused (*Van Allen v. Schermerhorn*, 14 *How. Pr.* 287. See *Geenia v. Keah*, 66 *Barb.* 245). In an action of claim and delivery the question came up whether "the plaintiff can discontinue on payment of costs merely, where the property has been delivered to the plaintiff, and the defendant has put in an answer entitling him to a return." And it was decided that he could not (*Wilson v. Wheeler*, 6 *How. Pr.* 49).

II. If the defendant is not entitled, as matter of right, to discontinue on payment of costs, then this order refusing leave so to do is not appealable (*Code of Civil Procedure*).

III. It would have been unjust and inequitable to have allowed the plaintiff to discontinue without returning the property (*Wilson v. Wheeler*, 6 *How. Pr.* 49-51). The court will bear in mind that, at the time this suit was commenced, the defendants were in possession of the lot, the object of this litigation, and that the plaintiff has now obtained the possession of

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it. He has obtained all that he could obtain had the litigation been continued until the court had passed upon the rights of all the parties before it. And now, when we have come in and denied his right to the lot, and claim to be its owners and entitled to possession, and ask to have his right and our right passed upon by the court before which he has brought us, and in a suit which he has instituted, and thereby asserted his willingness to have his right tried, he asks to be allowed to go, our right to the property yet untried, his right to the property, though denied by us, yet untried, but he to retain the property, and we to be driven to a new suit to obtain it.

IV. To have granted the motion would have been to deprive the statute under which we were let in to defend of its effect,—to make it useless and ineffectual; in effect to repeal it so far as this action is concerned. The statute provides as follows: “§ 34 [38]. Every judgment in ejectment rendered by default, shall, from and after three years from the time of docketing the same, be conclusive upon the defendant, and upon all persons claiming from or through him by title accruing after the commencement of the action. But within five years after the docketing of such judgment, on the application of the defendant, his heirs or assigns, and upon payment of all costs and damages recovered thereby, the court may vacate such judgment and grant a new trial, if such court shall be satisfied that justice will be promoted, and the rights of the parties more satisfactorily ascertained and established” (1 *R. S.* [6th ed.], p. 576, § 34 [38]; 2 *Id.* [Edm. ed.] p. 318, § 38). “§ 37 [41]. If the plaintiff shall have taken possession of the premises by virtue of any recovery in ejectment, such possession shall not in any way be affected by the vacating of any judgment, as herein provided; and if the defendant recover in any new trial hereby authorized, he shall be entitled to a

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writ of possession in the same manner as if he was plaintiff'' (3 *R. S.* [6th ed.] p. 577, § 37 [41]; 2 *Id.* [Edm. ed.] p. 319, § 41). The defendant, Darcy, having suffered a default, applied to the court, and the court, having been satisfied that justice would be promoted, has granted him a trial pursuant to the above quoted statute (§ 34), and allowed his landlords to come in with him as defendants, and, pursuant to the statute (§ 37), the property must remain in the plaintiff's possession until that trial. If, now, the plaintiff may discontinue before the trial so granted, then we, for whose benefit the statute was made, are deprived of its benefit; we cannot have that trial which the court, under the authority of the statute, and for the purpose of promoting justice, has granted to us. So far as we are concerned, it will be ineffective and void. And this will be the effect in every case where a plaintiff has obtained judgment in ejectment, whether on a trial or on a default.

BY THE COURT.—SEDGWICK, J.—The plaintiff's right to discontinue on payment of costs was gone if the action had passed into judgment. The defendant might then claim a right to the adjudication, even if it were wholly or partly unfavorable to him, although it cannot be supposed that a plaintiff would wish to discontinue an action, in which there is a judgment wholly favorable to his demands. The defendants' right did not depend upon the judgment having been actually entered of record. It was enough that a point had been reached which made the action ready for the entering of a judgment.

Leave to discontinue was never granted after a peremptory rule for judgment on demurrer, while, after demurrer argued and allowed, a discontinuance on payment of costs was allowed, if there were a mistake by the plaintiff in pleading. Afterwards the mistake

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was relieved by allowing the plaintiff to amend on payment of costs. After a special verdict the plaintiff might discontinue by leave, because it was not complete and final, as a matter of great favor, however. Leave to discontinue was never granted after a general verdict (2 *Wms. Saunders*, 73). A case there cited (*Stephens v. Etterick*, 1 *Show.* 63), was in covenant, and a writ of inquiry had been awarded, executed, returned, but not filed. Counsel for plaintiff moved for discontinuance, and argued that the judgment was but interlocutory for the award of inquiry, and nothing was reduced to certainty. The court held it was not different from the case of a verdict where a plaintiff could not discontinue, and that there could be no discontinuance without consent.

In the case at bar, though the judgment was vacated, the plaintiff was allowed to keep possession, taken under the execution, until a judgment should be had in defendant's favor. Manifestly the plaintiff has no right to discontinue to enable him to bring a new action, in this condition of things, or to compel the defendant to bring the action. There was an adjudication in effect in favor of defendant, that he was entitled to have this action to proceed to judgment. By reason of the action, the plaintiff has obtained possession, not as of absolute right, but of qualified right, the qualification being in defendant's favor. It is impossible that he should destroy this qualification by discontinuing the action, without relinquishing possession. I think the learned judge committed no error, by not allowing a discontinuance on condition of relinquishing possession and payment of costs, inasmuch as the plaintiff was not willing to perform such a condition.

The learned counsel for respondents claim that the vacating of the judgment was under the statute that relates to new trials in ejectment after judgment for plaintiff by default (2 *R. S.* 309, § 38, and p. 310, § 41 ;

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2 *Edm.* 318, 319). Section 38 is, that such a judgment may be within five years vacated upon terms, if justice require. Section 41 is, if the plaintiff have taken possession, by virtue of the recovery, such possession shall not be affected by the vacating of the judgment; but if the defendant recover in any new trial authorized by the statute, he shall be entitled to a writ of possession in the same manner as if he were plaintiff. In this case, if the plaintiff wishes to retain his possession, he cannot, by discontinuance, keep the defendants out of their right, to continue the action, to the end, if possible, of obtaining a writ of possession.

The order appealed from should be affirmed with costs of \$10, and disbursements.

CURTIS, Ch. J., and FREEDMAN, J., concurred.

JAMES D. FOWLER, ET AL., PLAINTIFFS AND
RESPONDENTS, v. JOHN KELLY, SHERIFF, DE-
FENDANT AND APPELLANT.

NEWLY DISCOVERED EVIDENCE.

NEW TRIAL, NOT GRANTED ON GROUND OF, WHEN.*

1. *Admissions by parties since trial.*

Not sufficient ground when fully met.

2. *Facts discovered since trial.*

Not sufficient, when it appears that such facts do not necessarily bear upon the issues involved.

* NOTE.—The principle upon which the decision rests, is that in addition to other requisites it must appear that there is a fair probability that the evidence claimed to have been newly-discovered, will change the result on a new trial. 3 *Graham on New Trials*, 1094, 1095.

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Before CURTIS, Ch. J., and SEDGWICK, J.

Decided February 4, 1878.

Appeal from order denying motion for new trial on ground of newly-discovered evidence.

This action is brought against the sheriff to recover the value of twenty hogsheads of molasses, seized by him about June 6, 1867, under an attachment issued on June 6, 1867, against the property of Thomas R. Gordon, in favor of Charles S. Archer, Washington Archer, and Pitt T. Tucker.

Plaintiffs had a verdict. A motion for a new trial was denied. Judgment was thereupon entered on the verdict. On appeal from the judgment, and order denying the motion for a new trial, both were affirmed.

Thereafter a motion was made for a new trial on the ground of newly-discovered evidence. This motion was denied, and the present appeal is taken from the order of denial.

On the trial one of the plaintiffs testified "that the molasses" in question "was not gauged because there had been no sale."

And the following delivery order was also put in evidence:

"To Merchants' Line steamers. No. 2016. Deliver to J. R. Gordon, E. A., 40 hhds. of molasses ex Key West. N. Y., June 1, 1867."

After the affirmance of the judgment, the indemnitors of the defendants employed a detective, who, after considerable search, found a firm of gaugers who, on June 7, 1867, at pier 4, North River, gauged for the plaintiff 40 hogsheads of molasses, ex Key West, F. & Co.

This fact was sworn to by the detective, in an affi-

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davit made by him, and was also proved by the two gaugers, who, being unwilling witnesses, were examined before a referee, under an order obtained for that purpose.

From the affidavit of the detective, and the testimony of the gaugers, it appeared that the firm of gaugers kept a book called a gauger's book, which contained entries of the gauging made by them ; that there was an evident desire to withhold this book ; that the book, when finally obtained, showed the following entry :

7.

“Fowler & Jova, Pier 4 N. R. G. 40 Hhds. molasses. Ex Key West. . F. & Co.”

Then followed four columns of figures ; and :

“5766-502-5264, N G.”

That, although the whole entry was in the handwriting of the witness, one of the gaugers, yet he swore that he had not the slightest remembrance of gauging any molasses for Fowler & Jova, in June, 1867, or of gauging any molasses for them, or any one at Pier 4 N. R. The detective in his affidavit also swore that the gauger, Webb, told him that the molasses referred to in the above entry in the gaugers' book, was gauged for Gordon ; that the direction so to gauge was on the original order which had been destroyed, as was usual ; he also swore that he had several interviews with Jova, one of the plaintiffs ; that Jova in fact seemed willing to impart information, that on the second interview he (the detective) “showed Jova the bill of lading of forty hogsheads of molasses by the steamer Key West, and Mr. Jova said that this was the molasses he had spoken of” (in a previous interview, as the detective swears, he had spoken of a sale of 40 hogsheads of molasses, in June, 1867, to a distiller named Gordon) as sold to said Gordon, “and that nothing had been received on account

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of that sale; that he (the detective) subsequently asked Jova to make an affidavit, and Jova said he would not, until he had examined the books, and he had no time then to do so, and would consult with plaintiff Fowler; that he (the detective) again called on Jova, who said he had never had time to fully talk with Fowler; that on the same interview, upon being again requested to make the affidavit, he said, "No, I am advised by Mr. Fowler not to sign any papers."

One of the sheriff's indemnitors, and Mr. John D. McCormick, made affidavits to the effect that they are well acquainted with the trade of dealing in molasses, and familiar with the trade in regard to gauging of molasses, that the custom of the trade, generally, is to gauge the various packages, only after or upon their sale. Mr. McCormick's affidavit set forth that this custom is so general and uniform, and has become so well established, that the gauge marks have come to be, and are indications that a sale has been had of the parcels on which they appear, since the arrival of the same at this port, and in the absence of other information showing the facts to be otherwise, said marks would be deemed by all dealers to be evidence that such packages had changed possession upon sale.

The motion for a new trial, on the grounds of newly-discovered evidence was based on these affidavits, and the examination of the gaugers before the referee, as showing the evidence claimed to have been newly discovered.

The motion was opposed on the affidavit of Mr. Jova, who fully met all the statements made in the detective's affidavit, concerning interviews between them; also on the affidavits of Fowler, one of the plaintiffs, and of said Gordon, to the effect that the molasses referred to in the above entry in the gauger's book was not sold to said Gordon, Mr. Fowler swearing that it was sold to a man named Dougherty.

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On the motion, it was argued that the 40 hogsheads mentioned in the entry in the gaugers' book, were those referred to in the above order, No. 2016, and that the twenty seized were a part of them.

Vanderpoel, Green & Cuming, attorneys, and *Robert D. Green*, of counsel, for appellant.

Henry Daily, Jr., attorney, and of counsel, for respondents.

BY THE COURT.—SEDGWICK, J.—The only fact on which a new trial could be ordered is the face of the gaugers' book. The affidavit of the detective, opposed, as it is, by answering affidavits, is not ground enough. The manner in which the gaugers avoid testifying with candor, is, of course, discreditable to them, but on such a motion that does not avail defendant. He must show the new facts by the witnesses themselves, and here the gaugers are his witnesses.

The gaugers' book contains the gauge of forty hogsheads of molasses for the plaintiff, on June 7, 1867, ex Key West, marked F. & Co., made at pier No. 4, on the North River. The defendant shows that by the practice of the trade, having rare exceptions, a gauging was not directed, unless it was needed to consummate a sale which had been made, so far as the bargain went. If this be so—if this case did not present an exception, if even the memorandum proves that a sale had been made to Gordon, the evidence on the trial shows the recovery was had upon a lot which had been removed from pier 4, had been placed in the warehouse, and had been seized by the sheriff (that seizure being the ground of the action) on June 6.

If one of the plaintiffs did not swear on the motion that the lot gauged on June 7, was sold to Dougherty, one could easily entertain the idea that the gauging

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disclosed in the book did comprise the twenty-two hogsheads in question, in spite of the date and the mark. Even then, if it was possible that it should have been ordered to accompany the very peculiar arrangement that the plaintiff's case on the trial showed existed between them and Gordon, a new trial could not be granted. The affidavit, having nothing to oppose it, must be taken to show that the lot referred to in the book went to Dougherty.

The order appealed from is affirmed, with costs.

CURTIS, Ch. J., concurred.

JOHN H. POILLON, PLAINTIFF AND APPELLANT,
v. CHARLES L. LAWRENCE AND ZIPPORAH
N. LAWRENCE, DEFENDANTS AND RESPOND-
ENTS.

BANKRUPT DISCHARGE.**1. IMPEACHING IN STATE COURT.**

(a.) FRAUD.—Cannot be impeached in State court on the ground that it was fraudently obtained.

(b.) JURISDICTION, WANT OF.—Cannot be impeached in State court for want of jurisdiction *on the ground* that the petitioner had not resided nor carried on business, for the six months next preceding the filing of his petition, nor for the longest period during such six months, in the judicial district where the same was presented.*

2. DEBT NOT MENTIONED IN PETITION OR SCHEDULES.

(a.) EFFECT OF DISCHARGE ON.—It is a discharge therefrom.

(1.) *Ignorance of creditor*.—Although the creditor was in fact

* NOTE.—This follows from the decision sustaining the demurrer.

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wholly ignorant of the bankruptcy proceedings, and his debt was not mentioned nor set forth in the petition or schedules, *yet the discharge in bankruptcy discharges the debt.*

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided February 4, 1878.

This is an action brought by the plaintiff, as assignee of Joseph Kittell and Alexander Klingenberg, judgment creditors of one Charles L. Lazarus (whom the complaint alleges to be defendant Charles L. Lawrence), to subject certain real estate, standing in the name of defendant Zipporah N. Lawrence, his wife, to the payment of the judgment, on the ground that the same was conveyed to the wife after the recovery of the judgment, the consideration for the conveyances being all paid by the husband, and that consequently the conveyances were taken to, and in the name of the wife, in fraud of the creditors of the husband, and of the plaintiff in particular, and to prevent the same from being made liable for his debts.

The defendants answer separately. Each defendant alleges that defendant Charles L. Lazarus, was, on March 24, 1865, duly authorized by an order of the court of common pleas, made pursuant to the provisions of chapter 464 of the laws of 1847, as amended by chapter 80 of the laws of 1860, to change his name from Charles Louis Lazarus, to Charles Louis Lawrence; which change of name was duly returned to the office of the secretary of the State, and was published in the session laws of this State, of 1866; and, among other things, pleaded in bar, a discharge in bankruptcy, granted by the district court of the United States for the southern district of New York, in bankruptcy, after the recovery of judgment by Kittell & Klingenberg, to the defendant, Charles L. Lawrence.

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Under an order of the court, plaintiff replied to the new matters contained in the answers as to the discharge in bankruptcy of defendant, Charles L. Lawrence.

The facts set out in the replies are in substance as follows :

1st. That although the plaintiff and the persons in whose name the judgment was recovered, have been, ever since the rendition of it, doing business prominently and conspicuously in the city of New York, they had never known or heard of the change of name of their judgment debtor, Lazarus, until after January, 1876, and just before the commencement of this action, and that they never knew or heard of his bankruptcy proceedings until his discharge was set up in the answer in this action.

2nd. That the petition and proceedings in bankruptcy of Charles L. Lawrence, do not set out, or mention or allude to the change of name, nor set out the plaintiff's debt, or judgment, or any debts of C. L. Lazarus, or of Lazarus & Wolff.

3rd. That the debt and judgment of the plaintiff, and all other debts contracted under the name of Lazarus, or of Lazarus & Wolff, were intentionally and fraudulently omitted from his schedules.

4th. That the change of name was used as part of a fraudulent scheme, contrived for the purpose of enabling the defendant, Lawrence, to get through bankruptcy proceedings, and obtain a discharge, without notice to the plaintiff, and other creditors of C. L. Lazarus, or of Lazarus & Wolff.

5th. That the scheme was successful, and enabled the defendant to go through and get his discharge in bankruptcy, without any notice of any such proceedings having reached the plaintiff, except accidentally, four or five years after he obtained his discharge.

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The replies also raised an issue, as to whether defendant, Charles-L. Lawrence, had resided or carried on business for the six months next preceding the filing of his petition in bankruptcy, or for the longest period during such six months, in the judicial district where the same was presented.

The defendants severally demurred to the replies for insufficiency, and upon hearing at special term before Judge SANDFORD, he ordered judgment for the defendants upon the demurrers, with costs.

Judgment was entered accordingly.

Plaintiff appeals from the order and judgment.

The following opinion was delivered at special term.

SANDFORD, J.—The case of *Ocean National Bank v. Olcott* (46 *N. Y.* 12), establishes the proposition that a discharge in bankruptcy cannot be impeached in any other court than that by which it was granted, on the ground that it was fraudulently obtained. In the present case, which is closely analogous, being, like that, an action in the nature of a creditor's bill, the plaintiff, as assignee of judgments against the defendant, C. L. Lawrence, seeks to enforce them against property standing in the name of the judgment debtor's wife, but held by her colorably and in secret trust for her husband. Both husband and wife answer separately, and each sets up, by way of defense, a discharge in bankruptcy, granted to him by the district court of the United States for the southern district of New York.

The plaintiff replies, and insists that the discharge is inoperative and of no effect as against his claims, not because they were fraudulently contracted, or incurred or created by the embezzlement or defalcation of the debtor, or while he was acting in any fiduciary

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character, but because the discharge itself was fraudulently obtained.

The grounds, upon which he assails it, affect its validity, and are such as, if duly presented in the bankrupt court, would have sufficed to prevent or annul it. The plaintiff's claims were provable against the estate of the bankrupt, and he might have had relief, had he duly applied for it, under and pursuant to the provisions of the bankrupt act, which accord to the bankrupt court exclusive jurisdiction to render it. Having omitted so to do, he is precluded from asserting, elsewhere and collaterally, the objections which, at the proper time and place, he omitted to urge. That such omission resulted from his ignorance of the facts and of the proceedings, is immaterial. The point has been expressly adjudicated in at least two well considered cases, each of which seems to me to have been correctly decided. They are *Black v. Blazo*, 117 *Mass.* 17; *Thurmond v. Andrews*, 10 *Bush*, 400.

The defendants are entitled to judgment on their demurrers, with costs.

Benjamin G. Hitchings, attorney, and of counsel, for appellant, urged :—I. It is not within the scope, or meaning, or intent of the bankrupt law, that a debtor under a changed name, should obtain a discharge from his debts contracted under a different name, without setting out or alluding to the change of name in his petition, or in any of the proceedings, or setting out in his schedules any debts contracted under his original name. Such a proceeding absolutely nullifies and avoids all the provisions of the law in favor of such creditors. It deprives them of all notice of the proceedings, and of all the provisions for notice contained in the act, and thereby of all participation in the assets of the debtor, and of all opportunity to be heard upon the question of his discharge. Such a pro-

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ceeding, as to such creditors, under such circumstances, can be of no validity or effect whatever. It is not within the purview of the act. Especially is that the case when the change of name is taken advantage of and used as part of a fraudulent scheme, to get a discharge without creditors having a chance or opportunity for any notice. To deprive a creditor of his debt by a discharge so obtained, would be in violation of a fundamental principle of jurisprudence and of constitutional law. It would be to deprive him of his property and his rights without any notice to him, and where he was intentionally and fraudulently deprived of the benefit of all the provisions for notice prescribed by the act.

II. So far as the rights of creditors are concerned, the fact that the defendant had procured a change of name by legal proceedings is immaterial. Creditors are not affected with notice of the change of name by virtue of such proceedings. The statute does not provide that the pre-existing rights of any parties shall be affected by the change of name, or that creditors or others shall be charged with notice of such proceeding. It simply provides that "thereafter he shall be known by the new name" (*L. of 1847, c. 464 ; L. of 1860, ch. 80*). The proceeding for the change of name is one simply and solely for the gratification or benefit of the applicant. It is simply a permission, as a favor to the applicant, to use thereafter a new name, without intending to affect thereby in any way the rights of creditors or others (See *Matter of Snook, 2 Hilt. 568*). The publication of the change of name in the session laws was not intended as a notice to creditors, but to furnish permanent evidence of the change in case it might be important with reference to the title or succession to property, or otherwise.

III. If the defendant wished to obtain a discharge from his debts contracted under the name of Lazarus,

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as well as those under the name of Lawrence, he should have set out, in his petition, his change of name, and the debts so contracted under the name of Lazarus in his schedules, so that the provisions of the act for notice to creditors and for the protection of their rights might have become applicable to the plaintiff and the other creditors of Lazarus. Not having done so, his discharge does not affect such debts. Such creditors were, in no sense, constructively parties to the proceeding, nor affected by it in any way. The discharge may be valid as to creditors of Lawrence, having debts contracted in that name. That is not the question. But how can it be valid against the creditors of Lazarus, who have, in no way, been made parties to the proceeding or had any opportunity of notice? The constitution provides that no man shall be deprived of his property without due process of law. And due process of law implies some judicial proceeding to which the person to be affected is a party, and of which he has such notice as the law provides for (*Taylor v. Porter*, 4 *Hill*, 140). Upon proof of a want of notice, and especially of a fraudulent deprivation of it, any judgment will be set aside (*Ogden v. Saunders*, 12 *Wheat*. 366). The notice required to render a judgment or decree valid need not be, in all cases, personal, but it must be, at all events, such as the legislature has seen fit to prescribe in reference to the proceeding under which the judgment or decree is made (*Empire City Bank*, 18 *N. Y.* 189; 8 *Abb. Pr.* 192). In bankruptcy proceedings the legislative power has seen fit to dispense with personal notice, and has substituted instead of it: 1st. A publication of various notices to creditors in the newspapers. 2nd. A notice to each of the creditors named in the schedules, sent usually by mail. But a publication in the newspapers that one Lawrence has filed a petition in bankruptcy, is no notice to a creditor of Lazarus, or of Lazarus and

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Wolff. Again, the provision for sending notices by mail or otherwise, to creditors named in the schedules, could be of no avail to creditors of Lazarus, because no such debts or creditors were set out or named. The plaintiff and other creditors of Lazarus were therefore absolutely and necessarily deprived of the benefit of all the provisions for notice prescribed by the act.

IV. Even in the ordinary case, where there has been no change of name, the weight of authority is to the effect, that an intentional or fraudulent omission of a debt, invalidates the discharge as to that debt so omitted, and that the creditor can avail himself of it in reply to the discharge when pleaded (*Bump on Bankr.* 731; *Batchelder v. Low*, 43 *Vt.* 662; *Beardsley v. Hall*, 36 *Conn.* 270; *Alcott v. Avery*, 1 *Barb. Ch.* 347; *Hubbel v. Camp*, 11 *Paige*, 310; 1 *Denio*, 75, 332, 619).

V. We come therefore to the inquiry, whether, when a discharge is pleaded as a bar to a debt, the creditor has a right to set up, in reply to it, its invalidity as against his debt—especially when in a case where he has not, and never has had an opportunity to contest in the bankruptcy court. The plaintiff is not precluded by section 5120 of the bankrupt act, or by any provision of that act, or by any principle of law, from contesting the discharge as a bar to his action in this court, where it is set up and pleaded as a bar to the action. *First.* He is not precluded by section 5120. This section does not, and from the nature of the case cannot, apply to creditors, not in any way made parties to the proceeding, and who have had no notice (*Bump on Bankr.* [8th Ed.] 756; *Barnes v. Moore*, 2 *B. R.* 573; *Bump on Bankr.* 729, 273). It is clear that the plaintiff cannot be precluded by the provisions of that section. 1. Because the grounds upon which the plaintiff relies to resist the discharge as a bar to his action,—*i. e.*, the proceeding under a new name, and the fraudulent deprivation of all notice of

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the proceedings,—are not among the grounds specified in the act, upon which to apply to annul the discharge in the United States court (See § 5110 of the act). 2. The time within which the application to annul the discharge could be made (two years from the date of it), had expired years before plaintiff had any notice of the change of name or of any bankruptcy proceedings. 3. What plaintiff complains of, is not a ground for annulling the discharge. He does not dispute the validity of the discharge as against debts contracted under the name of Lawrence. But he claims that the discharge is of no validity or effect against his debt. That as against him and other creditors of Lazarus, there has been no legal proceeding in bankruptcy, whatever. There is no provision in the bankrupt act for raising that question in the bankruptcy court. It can only be raised and decided where the discharge is pleaded (*Bump on Bank.* [8th Ed.] 729, 273; *In re Kimball*, 2 *B. R.* 204; Same case, 2 *Ben.* 554; affirmed on appeal, 6 *Blatchf.* 292; *In re Rosenberg*, 2 *B. R.* 236; S. C., 3 *Ben.* 14; *In re Wright*, 2 *B. R.* 142; S. C., 36 *How. Pr.* 167; S. C., 2 *Ben.* 509; *Batchelder v. Low*, 43 *Vt.* 662; *Beardsley v. Hall*, 36 *Conn.* 270. See also *Knobe v. Hayes*, 71 *N. C.* 109; *Perkins v. Gay*, 3 *B. R.* 772; *Bames v. Moore*, 2 *Id.* 573; *Hays v. Blore*, 14 *Mees. & Wels.* 387). But this is a very different case from any reported. If the plaintiff cannot be heard in opposition to the discharge, here, where it is pleaded, he has been deprived of his debt without any opportunity for a hearing, either before the discharge, or afterwards. *Second.* He is not precluded by the provision of the bankrupt act, that the discharge may be pleaded as a complete bar against all debts, that were proved or provable (Act, § 5119). But that does not mean that when pleaded as a bar, it must necessarily be adjudged to be a bar. The question whether it is valid as a bar against the

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creditor's debt, is to be determined upon the plea. The section referred to means no more than this. The discharge may be pleaded as a complete bar of the debt sued upon ; but if it can be shown not to cover or apply to the plaintiff's debt, the court must so determine upon the plea (*Bump*, 729 ; 2 *B. R.* 204 ; 2 *Ben.* 554 ; *Dusenbury v. Hoyt*, 53 *N. Y.* 521, and cases cited above).

VI. The question whether the State court is precluded from adjudicating upon the main question raised in this case, is much more than covered by a recent decision of the supreme court of the United States, in which it is held, that the common law jurisdiction of the State courts, in matters growing out of bankruptcy proceedings, is not abrogated or divested, except where the jurisdiction of the United States court is expressly made exclusive by the act (*Claffin v. Houseman*, 93 *U. S.* 130. See also *Cook v. Whipple*, 55 *N. Y.* 150).

VII. The case of the *Ocean Bank v. Olcott* (46 *N. Y.* 12) does not conflict with any position taken by the plaintiff in this case. In that case the plaintiff insisted that the discharge of the bankrupt was void, by reason of a fraudulent transfer of property to his wife before the bankruptcy proceedings. Nothing else was set up against the validity of the discharge. He was a party to the proceedings in bankruptcy, and had made an application in the United States court, which was then pending and undetermined, to annul the discharge upon the very same ground. Under such circumstances the court held, of course, that the question could not be raised in the State court, as it would or might result in a conflict of jurisdiction. In that case, the ground of disputing the validity of the discharge was a ground upon which to contest the granting of the discharge, or to move to annul it, and the plaintiff had actually resorted to that course. There is a de-

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cision in Massachusetts and another in Kentucky, that the fraudulent omission of a debt from the schedules does not invalidate the discharge as to that creditor's debt (117 *Mass.* 17; 10 *Bush*, 400); but those decisions are against the whole current of authority, against principle and good morals. But if admitted to be law, they are no authority for this case. In those cases there was no change of name, nor a failure to discover the bankruptcy proceedings until after all opportunity for redress in the United States courts was gone.

VIII. The bankruptcy proceeding in this case was not a proceeding involving the partnership of Lazarus and Wolff, and a discharge upon his individual petition does not discharge a partnership debt (*Bump on Bankruptcy*, 732, 762; *Hudgins v. Lane*, 11 *N. B. R.* 462; *In re Noonan*, 10 *Id.* 330; 2 *Id.* 78). It has frequently been so decided by Judge BLATCHFORD.

IX. The discharge is void for want of jurisdiction. To give jurisdiction, the bankrupt must have resided within the jurisdiction of the court, for a length of time before his application. In the reply to the answer of Mrs. Lawrence, plaintiff denies, and takes issue upon that question. In the reply to the answer of the defendant, Charles L. Lawrence, plaintiff makes the same issue of fact. The fact of residence within the district is jurisdictional (*Bump*, 731, 749; *In re Penn*, 3 *N. B. R.* 582; 4 *Ben.* 99; *In re Goodfellow*, 3 *N. B. R.* 452; *Johnson v. Ball*, 15 *N. H.* 407; *Morrison v. Woolson*, 23 *N. H.* 11; *McCormick v. Pickering*, 4 *N. Y.* 276; 24 *Barb.* 649; 68 *Id.* 416).

X. The discharge is a personal privilege. No one but the debtor can set it up. Mrs. Lawrence could not plead it (*Dewey v. Mayer*, 16 *N. B. R.* 1; *Bennett v. Caswell*, 7 *Gray*, 153).

Henry Stanton, attorney and counsel, for respondent, urged:—I. The discharge in bankruptcy extin-

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guished the debt which is the foundation of this action, and when this action was commenced the plaintiff was not a creditor within the meaning of the statute of uses and trusts (*Ocean National Bank v. Olcott*, 46 *N. Y.* 12).

II. The discharge in bankruptcy cannot be impeached in this court on the ground that it was improperly granted. The validity of the discharge can only be attacked in the Federal court, and that in the manner prescribed by section 5120 of the bankrupt act. The jurisdiction of the Federal court for that purpose is exclusive (*Ocean National Bank v. Olcott*, 46 *N. Y.* 12; *Stern v. Nussbaum*, 5 *Daly*, 382; *Stevens v. Brown*, 11 *N. B. R.* 568; *Black v. Blazo*, 117 *Mass.* 17; 13 *N. B. R.* 195; *Corey v. Ripley*, 4 *Id.* 503; *May v. House*, 4 *Id.* 677).

III. The facts that the plaintiff's judgment was not mentioned in the bankruptcy schedules, and that neither the plaintiff nor his assignors had any notice of the proceedings, are immaterial. The discharge, nevertheless, is a defense (*Stern v. Nussbaum*, 5 *Daly*, 382; *In re Archenbrow*, 11 *N. B. R.* 149; *Black v. Blazo*, 117 *Mass.* 17; 13 *N. B. R.* 195; *Thurmond v. Andrews*, 10 *Bush*, 400; 13 *N. B. R.* 157; *Lamb v. Brown*, 12 *Id.* 522).

IV. The fact that the debt was a partnership debt, and the bankruptcy petition an individual petition, is immaterial. Under some of the authorities that fact might be material, if it was also alleged, which it is not, that the copartnership was in actual existence, and that there were assets belonging to the firm (*In re Winkins*, 2 *N. B. R.* 349; *In re Little*, 1 *Id.* 341; *In re Abbe*, 2 *Id.* 75; *Wilkins v. Davis*, *Id.* Feb. 15, 1877, p. 60).

V. The plaintiff's judgment was provable in the bankruptcy proceedings, even though it was a partner-

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ship debt, and the petition was an individual petition (*In re Frear*, 1 *N. B. R.* 660).

VI. The allegation in the replies, that the name was changed with the fraudulent intent to procure a discharge in bankruptcy, is shown to be erroneous by the fact that the name was changed in 1865, while the bankrupt act was not passed for two years afterwards.

BY THE COURT.—FREEDMAN, J.—The reasons assigned by the learned judge below in sustaining the demurrers, are conclusive upon this court.

The order and judgment appealed from should be affirmed with costs.

CURTIS, Ch. J., and SEDGWICK, J., concurred.

GUSTAVUS ISAACS, PLAINTIFF AND RESPONDENT,
v. THE NEW YORK PLASTER WORKS, DEFENDANT AND APPELLANT.

COSTS, JUDGMENT FOR.

Decision of court of appeals, reversing the judgment, and ordering a new trial, with costs to abide the event, effect of upon the costs.

The party succeeding upon the first trial, and again succeeding upon the new trial (or his opponent failing to recover in the second trial, enough to carry costs), can include in his bill of costs as taxable items, the amount adjudged to him for costs by the judgment reversed, and the costs and disbursements awarded by the general term, as well as the costs, &c., of the appeal to the court of appeals, and of the second trial.

In this case the defendant is entitled to the costs of the first

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trial, &c., by virtue of the provisions of the code regulating costs.

Semble, when an appellate court grants a new trial with costs to abide the event, it is the costs of the appeal, and not the costs of the action, that are allowed (*Howell v. Van Siclen*, 8 *Hun*, 524; *affi'd* by court of appeals, June 5, 1877).

Before CURTIS, Ch. J., and SEDGWICK and FREEDMAN, JJ.

Decided February 4, 1878.

Appeal from order affirming taxation of costs.

The action was for the recovery of damages for breach of contract, and the issues were tried twice.

On the first trial, plaintiff's complaint was dismissed and defendant entered judgment for costs, which was affirmed with costs at general term.

On plaintiff's appeal, the court of appeals reversed the judgments, and ordered a new trial, with costs to abide the event, which was made the judgment of this court.

On the second trial, the jury, upon all the issues, rendered a verdict for plaintiff for six and one-quarter cents, which entitled the defendant to the costs of the action.

The clerk, in adjusting such costs, disallowed all items prior to the costs of the court of appeals, and, the taxation having been affirmed at special term, defendant appealed.

Dana & Clarkson, attorneys, and *F. E. Dana*, of counsel, for appellants, urged :—I. The verdict being for nominal damages, entitled defendants to costs, and no application to the court for leave to tax costs or enter judgment by them was necessary (*Fuller v. Coude*, 47 *N. Y.* 304; *Powers v. Gross*, 2 *N. Y. Weekly*

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Dig. 561 ; 66 *N. Y.* 646, court of appeals, affirming S. C., 6 *Hun*, 234 ; Lultgor v. Walters, 64 *Barb.* 417).

II. As to error of clerk in disallowing items sought to be taxed (*Code*, §§ 304, 305, 307 ; Sturges v. Spofford, 58 *N. Y.* 103 ; Same v. Same, 3 *Hun*, 52-57 ; Howell v. Van Siclen, 8 *Id.* 524 ; affirmed in the court of appeals, June 5, 1877 ; Lumbard v. Syracuse, &c. R. R., 62 *N. Y.* 290 ; Bathgate v. Haskins, 63 *Id.* 261 ; Koon v. Thurman, 2 *Hill*, 357 ; Von Kellar v. Schulting, 45 *How.* 139 ; Patten v. Stitt, 2 *J. & S.* 346 ; Van Wyck v. Baker, 4 *N. Y. W. D.* 597 ; Hamilton v. Butler, 4 *Robt.* 654 ; Spring v. Day, 44 *How.* 390).

S. A. Seixas, attorney, and of counsel, for respondents.

BY THE COURT.—FREEDMAN, J.—The taxation is sought to be upheld under the decision of this court in *Cochran v. Gottwald*, 42 *N. Y. Superior Ct. R.* (10 *J. & S.*) 214 ; where it was held that a defendant, on again succeeding upon a new trial, was not entitled to include in his judgment the aggregate amount of the costs and disbursements inserted into the first judgment, because the reversal of the judgment carried with it a reversal of the bill of costs as taxed.

But in the case at bar the defendant presented the items and claimed their allowance as just and proper ones. They must therefore be considered on their merits.

When thus considered it becomes at once apparent that the defendant had a clear right to the following, viz :

Costs before notice of trial,	\$10 00
Costs after notice of trial,	15 00
Five term fees, from June, 1873, to Dec., 1874,		50 00

These items were not in any sense costs of the first

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trial, but costs in the cause which the party eventually prevailing was entitled to tax, and as no further claim for any such item or items was made on account of the second trial, their disallowance was erroneous.

The remaining disputed items consist of a trial fee for, and defendant's disbursements on, the first trial, and the costs and disbursements awarded by the general term. These were all once adjudged to the defendant, but the judgments were reversed by the court of appeals, with costs to abide the event.

In *Cochran v. Gottwald* (*supra*), it was said, upon a somewhat similar state of facts, that costs could not be taxed by a party for proceedings that had been vacated for error in his favor, and that the statutory right of a party to costs attaches only to such proceedings as are regular on his part. And indeed it is difficult to perceive upon what principle a party finally prevailing should be allowed, not only the costs necessarily incurred to gain the final victory, but also those which were unnecessarily, and perhaps recklessly, made by him in consequence of proceedings which had to be set aside for error.

But in our judgment the question is no longer open for discussion here. In *Howell v. Van Sicien* (8 *Hun*, 524), the general term of the supreme court differed with this court upon this very question, and the view of that court was sustained by the court of appeals. From the printed papers in that case which were handed up, it appears that the issues were twice tried by a referee, each trial resulting in a judgment for the plaintiff. Upon an appeal from the first judgment, the judgment was reversed and a new trial ordered, "with costs to the defendant to abide the event." Upon the taxation of costs after the second trial, the plaintiff was allowed to tax a trial fee of \$30.00, and the referee's fee of \$350.00 for the first trial, and a trial fee of \$30.00, and the referee's fee of \$125.00 for the second

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trial. The defendant insisted that the reversal of the first judgment deprived the plaintiff of the right to tax the items relating to the first trial. But the supreme court at general term held :

“ When this court granted a new trial with costs to the defendant to abide the event, it was the costs of the appeal, and not the costs in the action, which were allowed. The plaintiff, having succeeded, was entitled to costs, but the defendant, having reversed the judgment, was allowed costs of the proceeding taken by him for that purpose, provided he succeeded in the action. The plaintiff could not have them in any event, because he did not maintain his judgment. The defendant was not, when the appeal was taken, entitled to costs ; he had not succeeded in the action, and the presumption must be against him, if any be indulged in, where the reversal of the judgment rests upon some error committed upon the trial. He was not the successful party, and still, insisting upon his non-liability for the plaintiff's claim, he demanded a new trial. He was again unsuccessful, and the plaintiff became, by the operation of the statute, entitled to the costs in the action, except the costs of the appeal. These costs were awarded him, and properly. He was the successful party.”

For these reasons, the taxation as had was upheld, and the court of appeals affirmed this decision on the 5th of June, 1877. No opinion was delivered by the latter court ; but as the affirmance could not well have proceeded upon any other ground than the one upon which the decision was placed below, namely, that the plaintiff had become entitled to the costs of the first trial by operation of the provisions of the code regulating the allowance of costs, we consider ourselves bound by it.

In the case at bar, the position of the parties is reversed. The defendant is the party finally prevailing,

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and as such he is entitled to tax all the items rejected by the clerk.

The order appealed from should be reversed with costs, the taxation re-opened, and the matter referred back to the clerk, with instructions to insert the rejected item.

CURTIS, Ch. J., and SEDGWICK, J., concurred.

MARY A. EGAN, PLAINTIFF AND RESPONDENT,
v. EDWARD T. WALSH, KATIE A. WALSH,
JAMES T. WALSH, MARY E. WALSH,
ALICIA L. DOLAN, AND JOHN B. DOLAN,
HER HUSBAND, DEFENDANTS AND APPELLANTS.

RECEIVER PENDENTE LITE.

1. DOWER, ACTION TO HAVE IT SET OFF.

(a.) Receiver of *all the rents and profits*, may be appointed.

1. *Partition. Prior decree in, when no objection to appointment of receiver in the dower action.*

Such decree, having been made in 1867 (the dowress being a party defendant), and the sole plaintiff having after decree conveyed all her interest to the only co-defendant of the dowress, such co-defendant being the mother of the defendants in the dower suit (the plaintiff and co-defendant of the dowress in the partition being the sole owner or tenant in common of the fee in the property), and said mother of the defendants in the dower suit, having died in 1872, leaving the defendants in the dower suit her heirs at law, and it not appearing that the partition action had ever been revived, or that the defendants in the dower suit had ever been made parties to the partition suit, or that the commissioners appointed by the decree to make partition, and to set-off one-third to the dowress as and for her dower, had

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ever acted, presents no objection to the appointment of a receiver in the dower suit.

2. *Circumstances which will warrant the appointment.*

See case.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided February 4, 1878.

Appeal from an order appointing a receiver.

The complaint set forth that James Egan died seized of certain real estate described, consisting of three houses and lots, leaving him surviving, the plaintiff, his widow, and two sisters, Catharine A. Walsh, and Julia Egan, his only heirs-at-law, and next of kin; that Julia Egan, on March 31, 1868, conveyed all her interest in said real estate to Catharine A. Walsh, who on January 20, 1872, died intestate, leaving her surviving, as her only heirs at law, the defendants in the suit (other than John B. Dolan), being her children; that plaintiff's dower has never been admeasured or set apart for her use and benefit, nor has any proceeding, either at law or in equity, ever been had or taken by her to have her dower admeasured or set apart; that the defendant, Edward T. Walsh, has been collecting all the rents since January, 1875, and has collected large sums; that he has refused to pay to the plaintiff the net one-third thereof, and there is a large sum of money due her by him, as well as the other defendants, on account of such rents; that in March, 1877, defendants, by two mortgages, mortgaged all their interests in and to said houses and lots, and there is great danger, unless the defendants are restrained from collecting and receiving the rents, that plaintiff's interests will be prejudiced, and she suffer great loss; that plaintiff has often demanded an account and statement of the rents received by said Edward, yet he, although admitting that he has collected large sums in rents, has refused

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and neglected to render any such accounts or statements.

The complaint then prays that her dower in said real estate, and her interest in and to the rents, issues and profits may be set aside for her sole use and benefit, so that she can collect and receive her one-third part thereof, in her own right; that defendants account for the rents received by them, and pay over to plaintiff such sums as shall be found due her; that a receiver of the rents be appointed *pendente lite*, and that defendants be enjoined *pendente lite* from collecting, demanding, or receiving any of the rents, income, and profits of said real estate.

Three of the defendants answered, and set up, as a first defense in bar, that, after the death of James Egan, and before the conveyance by Julia of her interest, as alleged in the complaint, Julia, about April, 1866, commenced an action in the supreme court, against Catharine A. Walsh, and her husband, and the plaintiff in this action, for a partition of said real estate, and for the admeasurement and assignment to the plaintiff in this action of her dower therein; that the summons in that action was duly and personally served on all the defendants therein; and that such proceedings were duly had in that action that judgment was recovered therein, dated June 7, 1867, and entered June 25, 1867, by which judgment it was adjudged and determined by the said court that the said plaintiff in this action was entitled for her dower in the said premises mentioned in the complaint herein, as the widow of the said James Egan, deceased, to one undivided third part of the said premises during her natural life, and adjudged the same to her, and further adjudged that three commissioners be, and by said judgment they were appointed to set off and assign to the said plaintiff such one third, pursuant to the said judgment and decree, to which reference is made for

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greater certainty ; that this action is brought for the same identical cause, as respects the said plaintiff in this action, as the said action in the supreme court.

That the said judgment in the supreme court still remains of record, wholly unreversed, and in full force and effect.

The answer further set up, as a second defense, that this action was brought without leave of the court ; that, by reason of the matters alleged in the first defense, it is an action brought upon a judgment, and therefore it cannot be maintained, as being contrary to the provisions of the statutes prohibiting an action upon a judgment, except by permission of the court.

The answer set up, as a third defense, that since January 1, 1876, the plaintiff had been paid by the defendant \$900, on account of her dower interest in said premises.

Plaintiff moved on the pleadings, and affidavits, supporting the allegations in the complaint as to the collection of rents, the non-rendering of accounts, and the giving of the mortgages by the defendants, and showing that no payments had been made to plaintiff since January, 1875, except \$900, and that Edward T. Walsh is a clerk, not in any business on his own account, and outside of his interest as one of the heirs, has no property, and also showing that the mortgages given by defendants amounted to \$3,000, for an injunction and receiver.

Defendants, in opposition to the motion, read the judgment in the supreme court set up in the answer, and an affidavit of Edward T. Walsh, sworn to Nov. 21, 1877.

This affidavit did not controvert any of the allegations of the plaintiff.

It stated that the annual rental was,	.	.	\$3,068
Annual expenses for taxes, repairs, insurance,			
and interest on mortgages	.	.	\$982

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It also contained the following averments :

“And this deponent further says, that before the plaintiff is paid any more money at present, it is necessary to take into consideration, and reserve out of the rents for that purpose, the necessary taxes for the current year, namely, \$450.50, and the sum of about \$270 for arrears of taxes ; that deponent has paid from said rents the interest on the said \$6,000 mortgage, which fell due on November 1, inst., being \$210.

“And this deponent further says, that this deponent and the other defendants, who are owners of the said real estate, subject to the plaintiff's unadmeasured right of dower, are entirely solvent and perfectly good, and responsible for any amount that may be due, or that may become due, to said plaintiff for her right of dower in said premises ; that they own said real estate, subject to said right of dower, and subject to the incumbrances aforesaid ; that the said real estate is reasonably and fairly worth the sum of \$30,000 ; that there has been collected by deponent, since July 31, 1877, of the rents of said premises, the sum of \$624, out of which deponent has paid, besides the above mentioned interest, \$210, the sum of \$258.10, for arrears of taxes, and has to pay the taxes for 1877, namely, \$450.50, and the sum of about \$270 for arrears of taxes, and has considerable repairs to make to the premises to keep them in tenantable order, and is also subject to divers incidental expenses in relation to the letting, and that the rents collected by him since such date, are not sufficient to pay all such sums.

“And deponent further says that there is no danger whatever that the plaintiff will lose any of her rights in said premises. That deponent has experienced great difficulty recently in collecting the rents on account of the fact that the premises are tenement houses, occupied by poor families, many of whom complain of being so deficient in work as not to be able

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to pay their rent promptly, and some of the tenants having been in arrears to a greater or less amount, some considerable time for their rent, and are paying along in dribblets."

The court at special term granted the motion, and an order was made appointing a receiver of *all the rents and income* of the real estate mentioned in the complaint, and enjoining the defendants from collecting or receiving the said rents and income, or any part thereof.

From this order defendants appeal.

Nelson Smith & Leavitt, attorneys, and *Nelson Smith*, of counsel, for appellant, urged :—I. The judgment in the supreme court, entered in the suit of Julia Eagan against Catharine Walsh, and the plaintiff in this action, dated May 27, 1867, by which the plaintiff's right of dower was adjudged and directed to be allotted and assigned to her, is a bar to this action to recover her dower. For this reason, a receiver should not be appointed (See opinion of Judge JONES, in *Gregory v. Gregory*, 33 *Superior Ct.* 39 ; *Owen v. Homan*, 3 *McN. & G.* 378).

II. Under the judgment in the supreme court the plaintiff is entitled to have her dower immediately set off, and to take a proceeding upon the footing of that decree for any accounting in relation to the rentals. This suit is therefore entirely unnecessary, and upon the principle that a receiver will not be appointed, where a plaintiff has a remedy at law, or any other adequate remedy, this appointment ought not to have been made (*Solari v. Leaver*, *L. R.* 9 *Eq.* 22 ; *Parmley v. Tenth Ward Bank*, 3 *Edw. Ch.* 395).

III. The plaintiff, since 1867, has acquiesced in the present mode of managing the estate. Such delay and acquiescence, in itself, constitutes a good defense to an application for a receiver. The principle is, that a

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court of equity, where there has been long delay, will not appoint a receiver (*Brown v. Chase, Walker (Mich.)* 43; *Could v. Tryon, Id.* 351; *High on Receivers*, § 14).

IV. But, independently of these considerations, no case is made on the papers for the appointment of a receiver. (1.) In so far as the plaintiff claims to recover her share of the rents received by the defendants, the suit is in the nature of an action for money had and received by the defendants to the plaintiff's use, and in that respect discloses no grounds for a receiver, any more than any action for money had and received, or to obtain an account for money had and received. The plaintiff is not entitled to any lien upon the premises for any balance that may be due in respect to the rents collected in the past, in regard to such rents, and would not be entitled to a receiver to enforce the payment of any such balance, any more than in any action to recover money. The order does not appoint the receiver of the moneys collected in the past; it is not shown, in fact that any of those moneys are now in existence, and the plaintiff's remedy for any such balance is against the personal liability of the defendants. (2.) Before assignment, a widow's right of dower is merely a right resting in action only, it does not give her any vested interest or right of entry upon the premises (*Yates v. Paddock*, 10 *Wend.* 528; *Ritchie v. Putnam*, 15 *Id.* 524, and cases there cited).

V. There is no danger shown. This is a vital point (*Willis v. Corliss*, 2 *Edw. Ch.* 281, 287; *Verplanck v. Cairns*, 1 *Johns. Ch.* 57, 58; *Orphan Asylum v. McCarty*, 1 *Hopk.* 429; *Goodyear v. Betts*, 7 *How. Pr.* 187; *Gregory v. Gregory*, 33 *N. Y. Superior Ct.* 1-39; *High on Receivers*, § 11).

VI. But in addition to this, there is nothing in the moving papers to show that the rents are in danger, or that the plaintiff has not an adequate remedy at law.

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Says BOWIE, Ch. J., in *Knighton v. Young* (22 *Md.* 372), in speaking of an application for the appointment of a receiver: "It is not sufficient to allege that the rents are in jeopardy, but it must be shown how they are jeopardized." (See also *Haines v. Carpenter*, 1 *Woods Circ. Ct.* 266; *Willis v. Corlies*, 2 *Edw. Ch.* 281; *Clark v. Ridgely*, 1 *Md. Ch. Dec.* 1870; *Blondheim v. Moore*, 11 *Md.* 365; *Burt v. Burt*, 41 *N. Y.* 46; *Haggerty v. Pittman*, 1 *Paige Ch.* 298).

VII. Here the defendants have a two-thirds interest, and the plaintiff only one-third. Notwithstanding this, the order appointing the receiver embraces the entire property. It is, in effect, giving to the plaintiff, as security for one-third of the income, not only her one-third, but two-thirds that belong to the defendants, in which she has no interest. This, we claim, was manifestly unjust, assuming that the plaintiff had a right to a receiver. There are here three distinct pieces of property, upon which there are five houses. If it were only intended to secure the plaintiff's right from the time of the appointment of the receiver, it would have been necessary to have extended the receiver only to one-third of the property, or to one of the lots having two houses upon it, instead of to the whole property.

E. Yenni, attorney, *B. F. Sawyer*, of counsel, for respondent:—I. The complaint of the plaintiff presents a proper case for the appointment of a receiver, in pursuance of section 713 of the new code. The plaintiff establishes a positive right to and an interest in the rents, issues and profits of the real estate to which she is entitled as dower right. The property is all in the possession of the adverse parties, the defendants; they use and occupy one of the houses. The defendant, Edward T. Walsh, in January, 1875, was duly appointed by the other defendants and this plaintiff to

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collect and receive the rents, and to pay over to this plaintiff her one-third part thereof. Since his appointment, up to the present time, he has never accounted or rendered any statement of the amounts of rents and income, nor of the payments, although repeated demands have been made of him so to do. The defendant, Edward T. Walsh, has admitted that there is a large sum due the plaintiff on account of the rents and income so received by him.

II. The plaintiff also has shown that there is great danger that her rights and interests will be jeopardized unless a receiver is appointed. 1st. The defendants, in March, 1877, mortgaged all their interest in the property. 2nd. The defendant, Edward T. Walsh, has neglected to pay arrears of taxes of 1876, although collecting all the rents. 3rd. The defendants are using and occupying one of the houses without paying any rent or accounting for any rent.

III. The defendants set up in opposition to the motion a decree made in the supreme court in June, 1867, in an action wherein Julia Egan was plaintiff and Catherine Walsh and this plaintiff and others were defendants. This decree does not affect the merits of this present suit. 1st. Julia Egan, the plaintiff therein, after the decree, conveyed all her interest in the real estate to Catherine Walsh, the mother of the defendants in this action. 2nd. The said Catherine Walsh died in 1872, leaving the defendants in this action her heirs-at-law. 3rd. That action has never been revived, nor are the defendants in this action parties to the same. 4th. The commissioners appointed by the court have never acted, and the decree has laid dormant for over eleven years. 5th. The complaint in this action is for an accounting of only the rents and income of the real estate since 1875, under an express agreement. 6th. Either party to the decree could have had it executed.

Statement of the Case.

BY THE COURT.—FREEDMAN, J.—Upon the whole case, as it was made to appear on the motion below, sufficient grounds appeared to authorize the court, in the exercise of a sound discretion, to appoint a receiver during the pendency of the suit. The action is in a condition to be tried at once, and at the trial the rights of all parties can be more satisfactorily determined than upon the present appeal.

The papers submitted presenting a case within the rule warranting the order as made, the order appealed from should be affirmed, with costs.

CURTIS, Ch. J., and SEDGWICK, J., concurred.

HENRI HENNEQUIN AND OTHERS, PLAINTIFFS
AND APPELLANTS, v. FRED BUTTERFIELD
AND OTHERS, IMPLEADED WITH HENRY CLEWS
AND OTHERS, DEFENDANTS AND RESPONDENTS.

I. EQUITY ACTION.

1. JURY TRIAL, RIGHT TO, OF CERTAIN ISSUES JOINED IN.

(a) Where the allegations contained in the complaint make out *an action in equity* for equitable relief, and certain of the allegations make out as to some of the defendants *an action at law* for legal relief, the issues of fact joined as to the allegations making out the equitable cause of action are to be tried and disposed of at a special term by the court without a jury; and if the equitable cause of action fails, and so leaves the issues joined on the allegations making out an action at law as to some of the defendants to be disposed of, those issues should be tried by a jury.

1. *This although* the complaint is as to the legal cause of action in form an action in equity, and the relief prayed in respect thereto is in form equitable relief.

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2. *This although upon the trial of the cause as an equity action, the defendants as to whom a cause of action at law is made by certain of the allegations in the complaint, as to which issue is joined, did not demand those issues to be tried by a jury.*

(b) APPLICATION OF RULE.

1. In this action, the judge at special term, having upon the proofs dismissed the complaint as to those defendants as to whom the allegation of the complaint made out a cause of action in equity, found as a conclusion of law, that as to the defendants with respect to whom certain of the allegations (upon which issue was joined), made out an action at law, the issues should be tried by jury. Upon the findings, judgment was entered dismissing the complaint as to the first set of defendants, and ordering that the judgment should be without prejudice to the right of plaintiffs to a trial by jury of the issues raised by the latter set of defendants,

Held,

Correct.

II. PLEADINGS, EVIDENCE UNDER.

1. BONA FIDES OF HOLDING NEGOTIABLE PAPER OR INSTRUMENTS.

(a) *Not necessary to be pleaded to admit evidence of, when.*

1. Where the complaint alleges a fraudulent hypothecation of the instrument by some of the defendants to a copartnership consisting of other of the defendants, for money theretofore loaned by said copartnership to the former defendants, and also alleges that if such copartnership bought the instrument, or advanced thereon any moneys in good faith and without notice of plaintiffs' ownership, yet it had sufficient other property held by it as collateral security to pay their claims and demands; and prays that the said copartnership deliver the instruments to the plaintiffs with all damages sustained by the conversion thereof, or if they shall have advanced any moneys thereon in good faith and without notice, then that they be allowed the amount thereof; and if they shall hold the securities in good faith, then that they account for the property held by them and received from the former defendants, and after deducting their claims and demands, pay to plaintiffs the surplus or so much as might be necessary to satisfy plaintiffs' claims, demands and damages against the former defendants.

Statement of the Case.

HELD

under denials of the above stated allegations in the complaint, evidence to show the transaction referred to was not with the copartnership, but with one of its members individually, and that he was in fact a bona fide holder for value without notice, was admissible.

III. PARTNERSHIPS.

1. FICTITIOUS NAME.

(a) *Statute against using.*

1. *Laws of 1833, ch. 281, must be construed in connection with ch. 400, Laws of 1854, and ch. 144, Laws of 1863.*

(a) CASE NOT BROUGHT WITHIN THE STATUTE.

Semble, A. lent the use of his name to a firm composed of B. and C., and the firm thereafter carried on business in the firm name of A. & Co. until 1866, when the business ceased, and the proceeds of the assets thereof belonging to B., passed into the hands of A. for management. A separate account, under the title of "A. & Co. of 1866," was kept of those proceeds, to distinguish them from the assets of a firm of "A. & Co." subsequently formed. It seems that a transaction had with D. under the title of "A. & Co. of 1866," whereby B.'s money was loaned to D., the check to D. being signed "A. & Co. of 1866," B. being then deceased, *does not fall within the prohibition of the statute*, there being no proof that the provisions of the enabling statutes under which the use of a copartnership name may be continued, had not been complied with.

2. INVOKING BENEFIT OF STATUTE.

(a) WHAT NECESSARY.

1. By plaintiff, the action must be based on the statute.
2. By defendant, the defense must be based on the statute.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided February 4, 1878.

The substance of the complaint in this action is; that plaintiffs deposited with Henry Clews & Co. certain securities in trust and for the purpose of securing said Henry Clews & Co., in the event of plaintiffs failing to remit to the firm of Clews, Habicht & Co., of

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London, the requisite funds to pay certain bills of exchange to the extent of £6,000, which Henry Clews & Co. authorized the plaintiffs to draw on Clews, Habicht & Co., of London, to provide for which Henry Clews & Co., at plaintiffs' request, opened a credit with the banking-house of Clews, Habicht & Co., of London, for £6,000; that plaintiffs took up and paid, or furnished Henry Clews & Co. with the funds wherewith to pay, all the bills of exchange drawn by them on Clews, Habicht & Co., of London, and demanded of Clews & Co., the said securities, which demand was complied with except as to certain bonds, the subject of this action; that defendants, Henry Clews and Theodore S. Fowler, composing the firm of Henry Clews & Co., fraudulently hypothecated with the defendants, composing the firm of Fred Butterfield & Co., the said bonds for money theretofore loaned and advanced by said Fred Butterfield & Co., and said bonds are still in the possession of said Fred. Butterfield & Co.; that Henry Clews & Co. borrowed from Fred. Butterfield & Co. about half a million of dollars, and hypothecated with them, as security therefor, property of the value of about a million of dollars; that if said Butterfield & Co. either bought said bonds or advanced any money thereon in good faith, and without notice of their belonging to plaintiffs, yet they have sufficient other property in their hands from which they will realize enough to pay their own claims and demands against Henry Clews & Co., without having recourse to said bonds; that Frederick S. Taylor, as assignee of Henry Clews and Theodore S. Fowler, claim some interest in said bonds. The prayer of the complaint was as follows:

“1st. That the defendants, Henry Clews & Co. and Fred. Butterfield & Co., deliver to these plaintiffs the said twenty-nine first mortgage bonds of \$1,000 each, of the Toledo, Peoria and Warsaw Railroad Company, Eastern Division, with the interest received thereon,

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together with all damages sustained by these plaintiffs for the conversion thereof.

“*2nd.* That if the said defendants, Fred. Butterfield & Co., shall have advanced any moneys on said bonds in good faith and without notice, then that said defendant, Fred. Butterfield, be allowed the amount so advanced thereon.

“*3rd.* That if the said defendants, Fred. Butterfield & Co., shall hold and own said twenty-nine bonds in good faith, then that they account to the plaintiffs for the property and securities held by them and received from said defendants, Henry Clews & Co., and after the said defendants, Fred. Butterfield & Co., shall have been paid therefrom their said claims and demands against said defendants, Henry Clews & Co., that they pay the surplus or so much thereof as shall be necessary to satisfy the plaintiffs’ claims, demands and damages against said defendants, Henry Clews & Co.

“*4th.* That the plaintiffs have judgment against the defendants, Henry Clews & Co., for all damages that said plaintiffs have sustained by reason of the unlawful conversion of said bonds.

“*5th.* That an injunction issue, restraining the defendants from parting with or disposing of said twenty-nine bonds; that a receiver be appointed, and that the plaintiffs have such other and further relief as to the court shall deem meet.”

The answer of Henry Clews and Theodore S. Fowler, among other things, denied that they fraudulently hypothecated said bonds, and alleged that they were hypothecated for the purpose, among other things, of carrying out the letter of credit, and the arrangements between plaintiffs and themselves.

The answer of the other defendants, among other things, denies the alleged fraudulent hypothecation, denies that Fred. Butterfield & Co. have sufficient

Statement of the Case.

property, other than said bonds, in their hands, from which they will realize enough to pay their own claims and demands against said Henry Clews & Co., without having recourse to said bonds, and denies that defendant, Taylor, claims some interest in said bonds. The answer contained no affirmative allegations to the effect that these defendants were *bona fide* holders for value without notice.

The action was tried at special term as an equity suit. The learned judge before whom the cause was tried found as conclusions of law :

“1st. That said bonds in suit are negotiable instruments, the title to which passes by delivery.

“2nd. That the estate of Wm. Butterfield, or his personal representatives, are the holders, in good faith, of said bonds in suit, and entitled to retain the same.

“3rd. That said Frederick Taylor has no interest in said bonds, either individually or as a member of the firm of Fred. Butterfield & Co., or as assignee of said Henry Clews & Co.

“4th. That the defendants, Frederick Butterfield, Frank H. Inloes, Edward A. Price, Frederick Taylor, and Peter B. Worrall, are entitled to judgment dismissing the complaint as against them, with costs, and two hundred and fifty dollars allowance.

“5th. That as to the defendants, Henry Clews and Theodore S. Fowler, the issues in this action should be tried by jury.”

Upon this finding, judgment was entered dismissing the complaint as against Fred. Butterfield, and others, constituting the firm of Fred. Butterfield & Co., and as against Frederick Taylor, as assignee of Henry Clews & Co., but without prejudice to the plaintiffs' right to a trial by jury of the issues raised by the answer of the defendants constituting the firm of Henry Clews & Co.

Appellants' points.

Plaintiffs appeal from the judgment and each and every part thereof.

C. Bainbridge Smith, attorney, and of counsel for appellants, upon the legal questions considered in the general term opinion, urged :—I. There was a mis trial. The action was purely of an equitable character, and the court had no authority to dismiss the complaint as to some of the parties, and direct another branch of it as a matter of law to be tried by a jury (1 *Story's Eq. Jur.* § 703, and cases cited ; *Bay v. Coddington*, 5 *Johns. Ch.* 54 ; *Lloyd v. Gordon*, 2 *Swanst.* 180 ; *Patrick v. Harrison*, 3 *Brown Ch.* 476 ; *Jackson v. Butler*, 9 *Mod.* 297 ; S. C., 3 *Atk.* 306 ; *Osborne v. U. S. Bank*, 9 *Wheat.* 738 ; *Hamilton v. Cummings*, 1 *Johns. Ch.* 517 ; *Kobbi v. Underhill*, 3 *Sandf. Ch.* 277 ; *Hasbrouck v. Vandervoort*, 4 *Sandf.* 74 ; *State of Illinois v. Delafield*, 8 *Paige*, 527 ; 2 *Story Eq. Jur.* § 1032 ; *Eden on Inj.* 210 ; *Brinkley v. Brinkley*, 56 *N. Y.* 192 ; 1 *Story's Eq. Jur.* § 71 ; 2 *Id.*, § 1, 483 ; *Code of Pro.* § 387). (1.) The extension of the jurisdiction of courts of law to cases which formerly were subjects of equitable jurisdiction exclusively has not ousted the jurisdiction of courts of equity (*White v. Meday*, 2 *Edw.* 486, and cases cited ; *Sailly v. Elmore*, 2 *Paige*, 497 ; *Mayne v. Griswold*, 3 *Sandf.* 464 ; *American Ins. Co. v. Fisk*, 1 *Paige*, 90 ; *McLaren v. Pennington*, *Id.* 102). Where equity obtains jurisdiction of a cause for any purpose it will retain it until justice is effected (1 *Story Eq.* § 74 ; *Id.* (11 Ed.) § 64, k ; *De Bemer v. Drew*, 39 *How. Pr.* 466 ; *Le Roy v. Veeder*, 1 *John. Ca.* 417 ; *Rathbone v. Warren*, 10 *Johns.* 587, 596 ; *King v. Baldwin*, 17 *Id.* 384).

II. The defendant Fred. Butterfield, and the other defendants, composing that firm, did not allege in their answers that they had received the bonds in question in good faith, without notice and for valuable consid-

Appellants' points.

eration (1.) Before the Code of Procedure this was requisite (*Wallyn v. Lee*, 9 *Ves.* 24, 33, 35 notes ; *Galatin v. Cunningham*, 8 *Cow.* 361 ; *Frost v. Beekman*, 1 *Johns. Ch.* 288 ; *Balcolm v. N. Y. Life Ins. Co.*, 11 *Paige*, 454-456). (2.) The rule under the code is as of old ; in order to admit testimony that a party is a *bona fide* holder for a valuable consideration, it is necessary that the answer should contain allegations to that effect (*Weaver v. Barden*, 49 *N. Y.* 286-9 ; *Field v. The Mayor*, 8 *Id.* 179). Therefore the court erred in allowing the defendants to prove that they were *bona fide* holders of the plaintiffs' bonds for value, and the exception thereto is well taken.

III. Frederick Butterfield carried on and transacted business under the firm name of "Fred. Butterfield & Co. of 1866." This was a fictitious name, and having obtained possession of the plaintiffs' bonds in violation of the statute of the State of New York he cannot hold them as against the plaintiffs (*Laws*, 1833, Ch. 281 ; see 4 *General Stat.* [Edm. ed.], 449). (1.) This act of the defendant, Fred. Butterfield, was within the plain provisions of the statute prohibiting such a transaction and upon principle and authority renders it void (*Griffith v. Wells*, 3 *Denio*, 226 ; *Swords v. Owen*, 2 *J. & S.* 277 ; *S. C.*, 43 *How. Pr.* 176 ; *Pennington v. Townsend*, 7 *Wend.* 276 ; 1 *Story Eq. Jur.* 296). (2.) If Frederick Butterfield could not recover the purchase money on a sale of the bonds, can he hold them against the owners when it appears he obtained them by and through the same illegal means ? Is it not a fundamental principle of law that no right can be derived from any contract made in express opposition to the laws where such contract is made ? (*Duncan v. McLure*, 4 *Dall.* 308 ; *Hall v. Mullin*, 5 *Har. & J.* 693 ; *Clark v. Shee*, 1 *Cowp.* 197 ; *Swords v. Owens*, 43 *How. Pr.* 176 ; *Ramsdell v. Morgan*, 16 *Wend.* 517 ; *Dean v. Howes*, *Hill & Denio*, 37 ; *Keutgen v. Parks*, 2

Respondents' points.

Sandf. 60. See also *Dix v. Van Wyck*, 2 *Hill*, 522 ; *Griggs v. Howe*, 2 *Keyes*, 166 ; *Armstrong v. Lewis*, 3 *M. & K.* 45 ; *Woodworth v. Bennett*, 43 *N. Y.* 273 ; *Tregoning v. Jenner*, 7 *Bing.* 97 ; S. C., 20 *E. C. L. R.* 60).

Boardman & Boardman, attorneys, and *Andrew Boardman*, of counsel, for respondents, urged :—I. A consideration of the pleadings deprives of all force the objections to testimony introduced on behalf of the defendant Butterfield, based upon the ground that it was not pleaded in the answer, viz.: the objection to the proof of the *bona fides* of the loan and pledge of securities, and also of Butterfield's not being himself interested either in the loan as security for which the bonds in suit were pledged, or in the bonds themselves. There was no necessity of pleading such matter in behalf of the firm of Fred. Butterfield & Co., and the complaint contained no allegations against Butterfield, except in his capacity as a member of that firm. They made no attempt to amend their complaint so as to notify Butterfield that they would, upon the trial, attempt to fasten upon him an individual liability, nor did they bring in as parties the persons really interested in the bonds. They chose to go to trial upon the complaint in its original form, and, having introduced evidence tending to show an individual liability on the part of Butterfield, attempted to shut out testimony on his behalf, on the ground that his answer did not properly plead matter of defense to a claim of which no mention is made in the complaint. Such testimony was properly admitted over the objection that it was not pleaded, which was the only objection taken.

II. The only ground upon which the special term took, or could take, jurisdiction of the present suit, as containing any equitable cause of action, was the claim

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set up in the complaint that the plaintiffs were entitled to an accounting and a marshaling of the securities held as collateral by Fred. Butterfield & Co., and to the release of the bonds in suit from the lien of their loan, on the ground that they held sufficient other collateral security for its payment without having recourse to these bonds. The evidence shows that the securities held as collateral would not realize sufficient to pay the loans for which they were pledged. This testimony is uncontradicted. Upon the proof of this fact, there disappeared from the case the only element entitling the plaintiffs to the interference of a court of equity.

III. The plaintiffs claim that the loan of \$690,000 was, on account of the use of the term "Fred. Butterfield & Co. of '1866," in contravention of the statute of April 29, 1833, prohibiting the use of fictitious names in business. This statute must be construed in connection with chapter 400 of the *Laws of 1854* (Session laws of that year, page 1084), and chapter 144 of the *Laws of 1863* (Session laws of that year, page 227), which are in *pari materia*, and which provide that the use of a copartnership name may be continued upon complying with their provisions as to filing a certificate and publishing an advertisement to that effect. The object of these statutes was to prevent persons from obtaining credit on the responsibility of supposed names included in the term "Co.," but here Fred. Butterfield represented an actual responsible name as to all the world except his partners, and "Co." represented two names—William Butterfield and L. A. Jacobus. Fred. Butterfield was a partner liable for all the debts of the firm, and it was only as between himself and the two persons included in the term "Co." that his liability was limited. The statute in question cannot avail the plaintiffs. For (1.) no case can be found in which a party

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has been allowed to take advantage of the statute, unless it was specially pleaded (*O'Toole v. Garvin*, 1 *Hun*, 92, and cases there cited). (2.) The court will not deprive the personal representatives of William Butterfield of their property by its judgment in an action to which they are not made parties, and have not had an opportunity to be heard. (3.) The transaction was not within either the spirit or the letter of the law, even if it be conceded that the making of the loan was "transacting business" within the meaning of those terms as used in the statute. The law was intended to prevent persons obtaining credit to which they were not entitled. In the present case credit was given to Clews & Co. The term was used in the liquidation of the affairs of a firm which had ceased doing business, and with the addition of the words "of 1866," employed simply as an ear-mark to keep the proceeds of the property of that firm entirely separate from other funds. (4.) There is no proof that the provisions of the enabling statute of 1854 have not been complied with. In the absence of such proof, the court will not presume that a party committed a misdemeanor (*Hartwell v. Root*, 19 *Johns.* 345; *People v. Pease*, 27 *N. Y.* 45; *Farmer's Loan Co. v. Curtis*, 3 *Seld.* 470).

IV. Finally, should it be held, not only that the statute applies, and that the plaintiffs can take advantage of it, but also that no subrogation takes place, still the judgment of the court below should be affirmed, as the plaintiff's remedy at law, by an action of replevin, was perfect against the parties holding the bonds; and with such a controversy the special term, or, in other words, the equity side of the court, had nothing to do, the defendants being entitled to a trial by jury (*People v. Albany R. R. Co.*, 57 *N. Y.* 161; *Hudson v. Caryl*, 44 *Id.* 553; *Bradley v. Aldrich*, 40

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Id. [1 *Hand*] 504; Mann v. Fairchild, 2 *Keyes*, 111; Heyward v. City of Buffalo, 14 *N. Y.* 534).

BY THE COURT.—FREEDMAN, J.—As to the defendant Taylor, it was found below, as a conclusion of law, that he has no interest in the bonds in controversy, either individually or as a member of the firm of Fred. Butterfield & Co., or as assignee of Henry Clews & Co. This finding was not excepted to, nor does the record contain any exception whatever under which the dismissal of the complaint as against him as assignee of Henry Clews & Co. could be reviewed.

As against the defendants constituting the firm of Fred. Butterfield & Co. the action proceeded on the theory that they, as against the plaintiffs, were not *bona fide* holders of the bonds in question for value, or, if they were, that the plaintiffs were entitled to an accounting and a marshaling of the securities held by Fred. Butterfield & Co. as collaterals, and to the release of the bonds in suit from the lien of their loan to Henry Clews & Co., on the ground that they held sufficient other collateral security for the payment of the loan without having recourse to these bonds. If the evidence given upon the trial failed to establish this theory, but a single issue remained to be tried between the plaintiffs and Henry Clews & Co., and that related solely to the alleged conversion of the bonds. For the purpose of trying that issue, the last named defendants had a right to demand a jury (*Sternberger v. McGovern*, 56 *N. Y.* 12; *Hudson v. Caryl*, 44 *Id.* 553; *Kinne v. Kinne*, 2 *Sup'm Ct. [T. & C.]* 393).

The bonds in suit were negotiable instruments, and as holders in good faith and for value Fred. Butterfield & Co. could, if necessary for their protection, retain them as against the plaintiffs. Under the issues raised by the pleadings they had a right to show that they were such *bona fide* holders for value, and the evidence

Opinion of the Court, by FREEDMAN, J.

given by them clearly established and fully justified the learned judge below in finding, as he did, not only that they had parted with full value upon the faith of the bonds and without notice of plaintiffs' rights in the premises, but also that in making the loan or loans to Henry Clews & Co. they had acted as agents only for others. Moreover, the plaintiffs not only failed to show that Fred. Butterfield & Co. held sufficient other collaterals, but the latter proved by testimony which remained uncontradicted, that all the securities held as collaterals would not realize sufficient to pay the loan for which they stood pledged.

It is insisted, however, that inasmuch as Frederick Butterfield made the loan in question under the firm name of "Fred. Butterfield & Co. of 1866," and at a time at which no such firm existed, he obtained possession of plaintiffs' bonds in violation of the statute of the State of New York forbidding persons to transact business under fictitious names (*L.* 1833, ch. 281), and that for this reason, if no other, the complaint was improperly dismissed as against him. The statute referred to, provides that no person shall transact business in the name of a partner not interested in his firm, and where the designation "and company" or "& Co." is used, it shall represent an actual partner or partners. It further provides that any person offending against its provisions shall, upon conviction, be deemed guilty of a misdemeanor, and be punished by a fine not exceeding one thousand dollars.

Upon this branch of the case the facts appear to be as follows:

About August 7, 1873, Frederick Butterfield, as agent of the estate of Sarah Hannah Butterfield, and out of the moneys in his hands belonging to said estate, and on securities including the twenty-nine bonds in suit, loaned to Henry Clews & Co. the sum of \$112,939.69.

Opinion of the Court, by FREEDMAN, J.

About September 4, 1874, Frederick Butterfield, as agent of the estate of William Butterfield, and out of moneys then in his hands belonging to said estate, loaned to Henry Clews & Co. the sum of \$690,000. Out of the sum so obtained Henry Clews & Co. repaid the loan had from the estate of Sarah Hannah Butterfield, and at the same time they transferred the securities held by Frederick Butterfield as agent of the estate of Sarah Hannah Butterfield to him, as agent of the estate of said William Butterfield, as security for said loan of \$690,000.

Prior to 1866, William Butterfield and one Lyman A. Jacobus had carried on business in the cities of London and New York under the firm name of "Fred. Butterfield & Co.," and to this business Frederick Butterfield had given the use of his name. The business ceased in 1866, and the said sum of \$690,000 formed part of the proceeds of the assets thereof which belonged to said William Butterfield, and as such it passed into the hands of Fred. Butterfield for management. In order to distinguish the proceeds of the said assets from the assets of the firm of Fred. Butterfield & Co. as subsequently formed, they were kept in a separate account under the title of "Fred. Butterfield & Co. of 1866." The transaction with Henry Clews & Co., as above stated, was made under that title in September, 1874, and by a check signed "Fred. Butterfield & Co. of 1866," though William Butterfield had died during the preceding month of June.

Upon this state of facts, it is clear that prior to and in 1866 the name of Fred. Butterfield represented an actual party responsible to all the world, except his partners, for the use of his name, and the term "& Co." represented two other parties, William Butterfield and L. A. Jacobus, who were partners in fact. By this arrangement Frederick Butterfield became liable for all the debts of the firm bearing his name,

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and it was only as between himself and the two persons included in the term “& Co.,” that his liability was limited.

Under these circumstances it may be a question whether the statute applies. This statute must be construed in connection with chapter 400 of the *Laws of* 1854, and chapter 144 of the *Laws of* 1863, which are in *pari materia*, and which provide that the use of a copartnership name may be continued upon compliance with their provisions as to filing a certificate and publishing an advertisement to that effect, and there is no proof that the provisions of these enabling statutes have not been complied with.

But another, and fatal objection is, that Frederick Butterfield was not declared or proceeded against under the statute referred to. The alleged violation of the statute, if any there was, not having been made the basis of the action, and the fact being that he acted as agent only for principals not before the court, the law will not deprive these principals of their property by means of a judgment to be rendered in an action to which they were not made parties, and in which they have had no opportunity to be heard. If the plaintiffs intended to rely upon the statute, they should have pleaded its violation (*O'Toole v. Garvin*, 1 *Hun*, 92).

The case also contains exceptions to the admission of testimony, to the findings as made, and the refusal of the court to find as requested by the plaintiffs, but under the views above expressed they are clearly untenable.

The judgment should be affirmed with costs.

CURTIS, Ch. J., concurred.

Statement of the Case.

ROSWELL D. HATCH, PLAINTIFF AND RESPONDENT, v. JOHN J. BOWES, IMPEADED WITH J. NELSON TAPPAN, CHAMBERLAIN OF THE CITY OF NEW YORK, AND THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, DEFENDANTS AND APPELLANTS.

NEW YORK CITY.

1. GRADES OF STREETS, CHANGING OF.

1. *Award* for damages under chapter 52 of the *Laws of 1852*, made to a certain named person by the board of assessors, and *deposited by the comptroller with the city chamberlain*.*

(a) CLAIMANT, in opposition to the person named in the assessment list as entitled thereto, REMEDY OF.

1. *An action against the party named in the assessment list for the recovery of a sum equal to the amount so deposited.*†

(a) The statute makes such deposit equal to a payment to the person named in the assessment list, for the purposes of a suit to be brought thereon.

2. *This right to bring action, enures to whom.* To every person seeking to enforce a claim to the award, no matter whether his alleged rights accrued before or after the making of the award, by operation of law or the act of the parties.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided February 4, 1878.

* The questions as to what remedy a claimant would have in case the comptroller refused to pay either to the chamberlain, or to the party named in the assessment list, and the party named refused or neglected to sue, or in case the party named was insolvent and the comptroller announced his intention to pay to him, or in case the claimant notified the comptroller not to pay, but he, nevertheless, did pay, were not involved in the decision of the demurrer.

† Of course, the right of *recovery* would depend on the claimant's establishing his right to the award.

Appellant's points.

Action to recover \$1,560, being the amount of an award made to defendant Bowes, by reason of damage done by the change of grade of Manhattan street.

The defendant, Bowes, demurred to the amended complaint, on the ground that it does not state facts sufficient to constitute a cause of action against him.

The demurrer was overruled with leave to answer, and from the order entered thereon the defendant appealed.

Thomas Winsor, attorney, and of counsel, for appellant, urged :—I. The only claim of Hatch is, that at the time when the work was actually commenced in changing the grade and regulating Manhattan street, he was then owner, and the award should have been made to him instead of Bowes, the present owner.

This means that the action of the board of assessors in allowing, and the board of revision in confirming, an award to Bowes, was erroneous, and so far void as that it may be assailed collaterally in an action against the city directly for the money, as though the award had been made to him ; and this without any proceeding, by mandamus or otherwise, against either board, to review, correct or change the award. The action of the boards of assessors and revision was judicial (*Barhyte v. Shepherd*, 35 *N. Y.* 238, 252–4). It can only be reviewed or corrected by mandamus, certiorari, &c., and the error, if there was any, “does not lay the foundation for an action at law to redress the alleged injury” (*Swift v. City of Poughkeepsie*, 37 *N. Y.* 511 ; *Barhyte v. Shepherd*, 35 *Id.* 255 ; *Heywood v. City of Buffalo*, 14 *Id.* 539). There is no award to Hatch, nor to unknown owners, and this action, as a proceeding to change the award from Bowes to him, cannot be maintained.

II. This court has decided, both at special and gen-

Appellant's points.

eral term, in this controversy, that the provision of the act of 1852, conferring special jurisdiction on this court in these proceedings, is unconstitutional and void. There are no remedies left, therefore, except that given by the statute itself. No action can be maintained under the statute excepting *assumpsit*, as for "money had and received" in behalf of the party who has the *legal title* (*Laws of 1852*, ch. 52, § 4). The plaintiff Hatch has no legal title, and therefore has no standing in court. The statute does not admit the inquiry whether an award has been erroneously made, but only whether it has been erroneously paid. This contemplates only claims for the award by persons in a representative capacity as heir, next of kin, assignee, judgment creditor, &c., of the party to whom the award is made. The words in the *proviso*, "their title to receive such award disputed," mean nothing different from this, namely, not to whom should this award have been made, but as it stands, to whom is it payable? Besides, doubtless, the whole proviso falls under the constitutional objection, its plan and scheme being broken.

III. No action can be maintained under this statute excepting against the party who has the money. It is not alleged that the defendant Bowes has ever received the money awarded to him. On the contrary, the complaint avers that it is held by the other defendants (*Laws of 1852*, ch. 52, § 4).

IV. The change of the grade of a street does not take private property for a public use, and there is no constitutional requirement that compensation shall be given (*Const.* art. 1, § 7). This award was therefore a pure gratuity given by the act in question *ex gratia* for the exercise by the State of its right of eminent domain. The case falls within the principle that every owner of property holds it subject to the paramount authority of the sovereign power to make public im-

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provements, notwithstanding incidental damage may result to individuals (*Brick Church v. The Mayor*, 5 *Cowen*, 538; *Stuyvesant v. The Mayor*, 7 *Id.* 588; *Coates v. The Mayor*, 7 *Id.* 585). At common law, therefore, the injury claimed would be *damnum absque injuria* (*People ex rel. Doyle v. Green*, 3 *Hun*, 759). The award is analogous to a bounty or pension granted by the government. The statute alone which gives the gratuity gives also the remedy. No action can be brought, and no action can be sustained against Bowes until he receives the money.

James A. Deering, attorney, and of counsel, for respondent, urged.—I. The plaintiff is entitled to sue. The mere mention of J. J. Bowes in the assessment list is not conclusive, as by section 4 provision is made for cases where the title of the party named in the assessment list is disputed. The counsel for Bowes based his argument at special term in support of his demurrer on the point that no equitable relief could be had in this matter, but that an action on assumpsit is the only remedy provided by *Laws of 1852*, section 4, statute 52. In this he is mistaken, as two distinct provisions are made by said section. *First*. That in case of non-payment of award by the mayor, &c., it shall be lawful for the persons entitled to the same to sue for and recover the amount (*Fisher v. Mayor*, 57 *N. Y.* 344). *Second*. That when such award is paid to the wrong person, it shall be lawful for the person to whom the award should have been paid to sue the person wrongfully receiving the award, as for so much money had and received. This action is brought under the first provision, which is general in terms, and Bowes is made a party defendant as claiming an interest adverse to the plaintiff under section 447, code of civil procedure.

BY THE COURT.—FREEDMAN, J.—The question pre-

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sented by the present appeal is one of pleading, and for the purpose of determining it the allegations of the complaint demurred to must be assumed to be true. No facts outside of it can be considered. The said complaint contains no allegation that the plaintiff ever conveyed the premises described therein to the defendant Bowes, or that the latter has, or ever had, any title to or interest in the same. It avers the making and confirmation, pursuant to the statutes in such case made and provided, of the award of \$1,560, for the damage and injury done to the premises by the change of the established grade of the street, and the regulation thereof in accordance thereto, and then proceeds as follows :

“ *Third.* That at the time of the actual change of grade of said street, and of the aforesaid regulation, this plaintiff, and one Daniel Green, were the owners of said premises, and the persons injured by said change of grade and regulation as aforesaid, and entitled to whatever award or damages made or to be estimated therefor.

“ *Fourth.* That on January 24, 1877, the said Daniel Green assigned to said plaintiff all his estate and interest in the sum awarded, as aforesaid, for said damages sustained, as aforesaid.

“ *Fifth.* That the said board of assessors allowed, and the said board of revision confirmed, the said damages to one John J. Bowes, who is made a party defendant hereto, and who claims the same, but that the said allowance was made without notice to, or the knowledge or consent of, this plaintiff, and without any examination as to the right to said award as between this plaintiff and the said Bowes, and that the said Bowes has no right, title or interest in, or to, the said award, or any part thereof.”

These allegations sufficiently show plaintiff's right,

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and sufficiently deny defendant's claim to the award as made.

The question then arises whether plaintiff has pursued the proper remedy to enforce his right.

At common law, a town or city is not liable for damages resulting to an abutting owner from a mere change in the grade or surface of the public highway, if the change does not extend beyond the limits of the highway. The loss which he suffers from such a change is *damnum absque injuria*.

By chapter 52 of *Laws of* 1852, however, compensation is directed to be made in certain cases. The statute prescribes the mode in which the loss or damage shall be ascertained and the award made and paid. It also makes provision for cases of conflicting claims to the same award, and for claims by persons under disabilities, and by unknown owners whose names could not be ascertained by the assessors, but is to a great extent silent as to the manner in which conflicting claims are to be determined.

The plaintiff heretofore applied on petition that the comptroller be directed to pay to the chamberlain the said award of \$1,560 to await the determination of the rights of the petitioner, and that the court take proof and determine the title of the petitioner and other claimants to the award; and it was held, both at special and general term, that no jurisdiction had been conferred to determine the matter in any such summary manner. At the same time it was intimated that the remedy was by action.

The plaintiff thereupon brought this action, in which he asks judgment against the mayor, aldermen and commonalty of the city of New York for the sum of \$1,560; that the chamberlain be directed to pay over to the plaintiff a certain part of the said award which has already been paid over to him by the comptroller;

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and that J. J. Bowes be adjudged to have no interest or title in and to the said award.

The defendant, Bowes; being the only defendant, who interposed a demurrer, it is only necessary to ascertain whether the action as brought is well brought against him.

The complaint contains no allegation of insolvency on the part of Bowes, nor does it contain any other allegation calling for the interposition of the equitable powers of the court, and consequently it must be treated as resting upon the statute exclusively. This renders it necessary that we should re-examine the intimation thrown out by the court on the former occasion, and determine in what cases and to what extent the statute gives a right of action.

Under the statute the awards, if any be made, are to be made by the assessors to the owners of the lands or tenements fronting on the street and opposite thereto (§ 3).

Within four months after the ratification of the assessment, the corporation of the city of New York is directed to pay to the respective parties entitled thereunto the amount of such awards in their favor respectively; and in case of neglect or default to pay the same, after demand made therefor, the persons entitled to the same may sue for and recover the amount (§ 4).

The words "respective parties entitled thereunto" and "persons entitled to the same," as thus used, evidently refer to the owners named in the assessment list in whose favor the awards were made by the assessors, and no others, and this is the interpretation to be given to the statute. All others are left to pursue, in the first instance, whatever remedy may be appropriate to effect a revision and correction of the assessment, and in case of non-success or failure to take the necessary steps, they have, except in the few instances to be hereafter stated, no direct right of action.

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The statute next provides, that in case an award shall be paid to any person or persons not entitled thereto, the person to whom the same ought to have been paid, may sue for and recover the same with lawful interest and costs of suit as so much money had and received to his use. The right of action hereby conferred arises after payment, and is enforceable only against the person or persons to whom payment was made. The question as to what persons are included in the words "the person to whom the same ought to have been paid," I shall discuss hereafter.

The plaintiff not having been enumerated in the assessment list as the person entitled to receive the award, and the award, as made, not having been paid over to Bowes to whom it was made, the action set forth in the complaint cannot be maintained under the provisions of the statute so far considered.

The statute, however, finally provides as follows:

"Provided, that when the name or names of the owner or owners, party or parties are not set forth in the report of the assessors, or where the said owners, parties or persons respectively, being named therein, shall be insane, a married woman under the age of twenty-one years, or absent from the city, or after diligent search cannot be found, or their title to receive such awards disputed, it shall be lawful for the said mayor, aldermen and commonalty to pay the sum or sums mentioned in said report, or that would be coming to such owners, parties and persons respectively, to the chamberlain of the city of New York, to be secured, disposed of and improved as the superior court shall direct, and such payment shall be as valid and effectual in all respects as if made to the said owners, parties, and persons respectively themselves, according to their just rights, if they had been known and had been present, of full age, single woman and of sound mind."

This proviso again shows that it was the intention

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of the legislature to shield the corporation against actions at law instituted by persons other than those named in the assessment list. The statute first authorizes all so enumerated to maintain actions directly against the corporation, in case of its neglect or refusal to pay ; to such as are not thus enumerated, it gives a remedy against those to whom payment may have been made ; and finally, the proviso makes a deposit with the chamberlain equal to a payment, for the purposes of a suit to be brought thereon. But no jurisdiction is conferred to compel a deposit.

The complaint alleges that a small portion of the sum of \$1,560 was on or about January 12, 1877, paid by the comptroller to the chamberlain, who now holds the same, and hence, *to the extent of that deposit*, the complaint states a sufficient cause of action against Bowes, provided the plaintiffs were authorized to sue, if payment had actually been made to Bowes. The reason for which the deposit was made, is immaterial. It may well be that the comptroller set off an assessment levied upon the premises in question for benefit against the sum of \$1,560 awarded for damage, and that the amount deposited represents the difference only. Whatever the fact may be, it is sufficient that there is in the hands of the chamberlain a sum of money representing a portion of the award.

The only remaining question, therefore, is whether the statute would authorize plaintiff to sue Bowes as for money had and received to plaintiff's use, if payment had been made to Bowes.

It has already been shown that so far as the statute gives the right to sue the corporation, the right is confined to the persons who had amounts awarded to them in the assessment list. But the remedy by action against such as received the award without being entitled thereto, is, as regards those authorized to sue in such case, not restricted to any particular class. As

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to the parties empowered to bring such a suit there are no words of limitation. On the other hand, the proviso expressly provides that, as against certain parties named, a deposit with the chamberlain shall be just as effectual as if payment had been made in some other lawful manner. Upon the whole statute, therefore, I am of the opinion that the words "person or persons to whom the same [viz., the award] ought to have been paid," are comprehensive enough to include every person seeking to enforce a claim to the award as made, no matter whether his alleged right accrued before or after the making of the award, by operation of law or the act of parties, and that every such person may maintain an action against the party to whom the award was paid, or for whose account a deposit was made.

For the reasons stated, the facts set forth in the complaint are sufficient to authorize a recovery against the defendant Bowes to the extent of the amount in the hands of the chamberlain, and consequently the demurrer was properly overruled.

The order appealed from should be affirmed with costs, and with leave to defendant to answer on payment of costs.

CURTIS, Ch. J., and SEDGWICK, J., concurred.

Statement of the Case.

SIMON COHN AND MANHEIM COHN, PLAINTIFFS
AND RESPONDENTS, v. PHILIP GOLDMAN,
IMPLEADED WITH WILLIAM HARTMAN, DE-
FENDANTS AND APPELLANTS.

I. CONSPIRACY TO CHEAT AND DEFRAUD.

1. *Action to recover damages sustained by reason thereof.*

(a) PLEADING.—COMPLAINT, WHAT SUFFICIENT.—GENERAL ALLEGATIONS.

1. A complaint alleging generally that defendants "did in concert by connivance, conspiracy and combination, cheat and defraud plaintiffs out of" is a sufficient allegation of the fraud and conspiracy.

II. CONSPIRATORS.

1. LEGAL STATUS OF.

- (a) They are joint tort-feasors.

2. LIABILITY, EXTENT OF.

- (a) *The act of one acting in concert with others, is, in judgment of law, the act of all, and each is liable for all the injurious consequences flowing from it.*

3. WAIVING TORT AS TO ONE, EFFECT OF AS TO THE OTHERS.

- (a) Electing to waive the tort as to one, and to sue him in contract, *hath not the effect* of an election to waive the tort as to the others. The others still remain jointly and severally liable in tort. *Neither the pendency of the action against the one as to whom the tort is waived, nor a judgment rendered therein without actual satisfaction, will constitute a good plea in abatement or bar.*

1. FORMER RECOVERY.—PLEADING.

- (a) A plea of former recovery against one or more joint tort-feasors, whether in contract or in tort, *to be good must also aver actual satisfaction.*

1. APPLICATION.

Plaintiffs sued H. in an action for goods sold and delivered. Upon an affidavit setting forth that the sale was procured by false and fraudulent representations made by H., an order of arrest in that action was obtained against H. H. defended. After issue joined, an arrangement was made

Statement of the Case.

whereby plaintiffs consented to a *vacatur* of the order of arrest, and in consideration thereof, H. allowed them to take judgment for their claim and costs. Afterward the plaintiffs in that suit commenced an action in tort against G. and H., charging they did in concert by conspiracy, cheat and defraud plaintiffs out of said goods. G. alone defended this action, and relied on the action against H., and the judgment therein, as a bar.

HELD,

that those matters constituted no defense, there being no satisfaction of the judgment.

III. NEW TRIAL—MOTION FOR, ON GROUND OF INSUFFICIENCY OR PREPONDERANCE OF EVIDENCE.

1. *General rule* is that when defendant has omitted to move for a non-suit, or the direction of a verdict, on the ground of insufficiency of plaintiff's proof, and has treated the case as one calling for submission to the jury, *he cannot, in support of a motion for a new trial, be allowed to claim* either that the evidence is so insufficient on plaintiff's side, or so overwhelmingly preponderating as to authorize but one verdict,—viz., one in his favor.

(a) RULE RELAXED.—In the case at bar the rule was relaxed by reason of its being a highly peculiar case, and the preponderance in the number of witnesses so largely in appellant's favor.

IV. WITNESS.

1. ACCOMPLICE.

(a) *Verdict based, in the main, upon the testimony of an accomplice, sustained.*

- (1) Plaintiffs' case, in the main, depended on the evidence of H., who testified to a conspiracy between him and G. to defraud the plaintiffs, and to the accomplishment of the fraud alleged in the complaint. He was contradicted by G., and in essential particulars, by at least half a dozen witnesses, in such a manner that if he told the truth, they willfully perjured themselves. He, however, was corroborated to a large degree by facts and circumstances.

HELD,

a verdict for plaintiffs should not be disturbed.

V. EVIDENCE.

1. FRAUD—GENERAL PRINCIPLES TOUCHING EVIDENCE TO ESTABLISH.

Statement of the Case.

It is the most subtle of legal elements, and is frequently developed by comparatively trifling facts and circumstances, which, isolated, amount to little, but which, when united by intellectual power, present the charge made clearly and beyond doubt. In such a case, the conduct of the persons charged, while upon the stand, may have an important bearing upon the determination of the issue.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided February 4, 1878.

The action was brought against Philip Goldman and William Hartman, for a conspiracy, by means of which the plaintiffs were cheated and defrauded out of eight bales of Havana tobacco.

The defendant Hartman interposed no defense, and on the trial was plaintiffs' chief witness.

The complaint was as follows :

“The complaint of the plaintiffs in this action avers that at the city of New York, at divers times between the 22nd of October and the 30th of December, 1874, the defendants in this action in concert did, by connivance, conspiracy and combination, cheat and defraud the plaintiffs out of eight bales of Havana tobacco, in value in the aggregate the sum of seven hundred and seventy-three dollars and fifty-one cents, and at the time of the said cheating and defrauding the plaintiffs out of the said property, that the same was the property of the said plaintiffs, and the said property, by means of the said fraud and cheating, has been wholly lost to the plaintiffs.

“Wherefore the plaintiffs claim judgment against the defendants for the sum of one thousand dollars, besides the costs and disbursements of this action.”

The answer of the defendant Philip Goldman contained a general denial, and as a plea in bar, that the plaintiffs had recovered a judgment against Hartman

Appellants' points.

for the value of the tobacco, in an action on contract, brought in the court of common pleas.

Upon the trial, a motion was made for a dismissal of the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, but mere conclusions. The motion was denied, and the defendant Goldman excepted.

Testimony was adduced by both sides, at the conclusion of which, a motion was made for the direction of a verdict for the defendants, on the ground that plaintiffs, with knowledge of all the facts, had elected, in the action brought against Hartman, to release him from jail, where he was confined under an order of arrest, and to take judgment against him for the value of the goods, and that they are concluded by that election.

The motion was denied, and exception taken.

The case was submitted to the jury under a charge to which no exception was taken, with the exception of that portion of it, which stated, that if the plaintiffs were entitled to recover, they are entitled to recover for the eight bales.

The jury found for the plaintiffs.

The defendant Goldman moved for a new trial on the minutes, on the exceptions, and also on the ground that the verdict was contrary to evidence, and the weight of evidence ; which motion was denied.

Judgment having been entered, the defendant Goldman appealed from the judgment and the order denying his motion for a new trial.

L. A. Gould, attorney and of counsel for appellant, urged:—I. The complaint ought to have been dismissed. The learned justice at the trial was clearly of that opinion, but felt bound to follow the case of *Ynganzo v. Salomon* (3 *Daly*, 153), which, as respondents' counsel stated, was affirmed in the court of appeals.

Appellants' points.

There is no opinion of the court of appeals ; it does not appear that the sufficiency of the complaint was questioned in that court, and, therefore, it ought not to control the general term.

II. The verdict is against the evidence. It is the right and the duty of the general term, in a proper case, to review the facts and see whether or not the verdict ought to be upheld (*Godfrey v. Moser*, 66 *N. Y.* 250). Here followed a discussion of the evidence.

III. Appellants' exceptions, it is submitted, should be sustained. According to Hartman's own confession, which accords with the charge made against him by the plaintiffs, he sold tobacco at a price less than that he was to pay for it ; there is no claim that this was any part of the alleged conspiracy ; there is no pretense that the defendant Goldman ever knew the plaintiffs, nor that Hartman ever stated he was buying or was to buy goods from the plaintiffs ; Hartman says he gave the goods to Goldman, but as to Cohn's goods, he may have sold some and kept the proceeds himself. In the absence of any averment that he bought all of these goods pursuant to this fraudulent scheme, plaintiffs' recovery ought to be limited to the value of the goods which they could show were actually obtained pursuant thereto.

IV. But the plaintiffs, with full knowledge of all the facts, compromised their cause of action with Hartman, and took a judgment on contract against him alone for the value of the goods, thus treating the transaction as a sale to Hartman, and vesting and confirming the title to the goods in Hartman alone. This bars their recovery against Goldman, both because they elect to consider the entire transaction a contract of sale with Hartman alone, and merge their cause of action in the judgment, and also because they waived the tort as to Hartman, a joint tort-feasor, which discharges the co-tort-feasor also. The stipulation con-

Appellant's points.

stitutes a compromise with Hartman. It is well settled that plaintiffs could not maintain an action for the conversion of these goods after they had recovered judgment in an action on contract as for goods sold and delivered, not because this would treat the contract as valid and void at the same time, but because one would proceed upon the theory that there was a contract, and the other upon the ground that there had never been a contract (*Kennedy v. Thorp*, 51 *N. Y.* 174). Where a party has suffered damages by reason of a fraud perpetrated under the cover and guise of a contract, and on discovering the fraud brings an action in tort, it is sometimes said he disaffirms or rescinds the contract; but, in strict accuracy, he elects to treat the pretended contract as void, that is, as no contract, by reason of the fraud that vitiates and destroys all contracts. For these reasons, any action sounding in tort is not concurrent nor consistent with an action on contract founded upon the same transaction. And the plaintiffs having elected to sue on contract, they cannot sue in tort (*Wright v. Ritterman*, 4 *Rob.* 704; *People v. Kelly*, 1 *Abb. Pr. N. S.* 432; *Bank of Beloit v. Beale*, 34 *N. Y.* 473; *Dyer v. Tilton*, 23 *Vt.* 313; *Sanger v. Wood*, 3 *Johns. Ch.* 416; *Rademund v. Clark*, 46 *N. Y.* 354; *Morris v. Rexford*, 18 *Id.* 552; *Shuman v. Straus*, 52 *Id.* 407; *Mallory v. Leach*, 23 *How. Pr.* 512).

V. It must be conceded that any compromise or settlement made with one of two joint tort-feasors releases the other also (*Barrett v. Third Avenue R. R. Co.*, 45 *N. Y.* 628). Plaintiffs waived the tort as to Hartman by their stipulation, and entered judgment on contract against him for the value of the goods. This extinguished their entire cause of action against Hartman (*Goodrich v. Dunbar*, 17 *Barb.* 644; *McButt v. Hinch*, 4 *Abb. Pr.* 441, and cases cited, *supra*). The plaintiffs thereby condoned the tort as to Hartman

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(*Nelson v. Blanchfield*, 54 *Barb.* 630 ; *Alliance Insurance Company v. Cleveland*, 14 *How. Pr.* 408 ; *Merchants' Bank v. Dwight*, 13 *Id.* 367). And a judgment on contract is as complete a bar to another action for the same cause as a release.

VI. The case of *Morgan v. Skidmore* does not conflict with these views ; it decides that a member of a firm who makes false representations as to its solvency, which representations induce a sale to the firm on credit, is liable as the guarantor of the firm debt, and may be sued in a separate action, although a judgment on the contract has been entered against the remaining partner of the firm. That is an action for fraud and deceit, whereby the plaintiffs were induced to give credit to a person other than the one who made the representations. To render the present case analogous, Goldman and Hartman should be copartners in business, the fraudulent representations should be made by Goldman as to the solvency of the firm, the contract should be made with the firm, and upon Goldman's death, a judgment on the contract should be rendered against Hartman as survivor. In *Morgan v. Skidmore*, no question arises as to the waiver of the tort as to one of two joint tort-feasors, for the firm was liable solely upon the contract. Upon what principle, or by what reasoning, can it be held in the present case, that Hartman, after judgment upon the contract, was still liable to be sued and again arrested for the fraud, or be subjected to another judgment for the same cause ? In *Dyer v. Tilton*, 23 *Vt.* 313, cited *supra*, the court says : "It is impossible to say where one has an election of remedies for the same cause, and takes judgment in one form, he can then pursue the other against the same person, and thus have two judgments at the same time for the same cause of action, against the same person."

Respondents' points.

Lauterbach & Spingarn, attorneys, and *H. Morrison* and *S. Spingarn*, of counsel, for respondents, urged:—I. The complaint is sufficient (*Ynguanzo v. Salomon*, 3 *Daly*, 158; *aff'd* in court of appeals).

II. The fact that plaintiffs have recovered a judgment against one of the defendants, which judgment remains unsatisfied, is not a good defense by the other defendant in the present form of action, and the ruling of the court should be sustained (*Ynguanzo v. Salomon*, 3 *Daly*, 158, and Ct. of App.; *Morgan v. Skidmore*, *supra*; *affirmed* in court of appeals; *Goldberg v. Dougherty*, 7 *J. & S.* 189; *United Society of Shakers v. Underwood*, 11 *Bush*, 265; 21 *Am. Rep.* 214; 55 *Barb.* 263; *Co. Litt.* 352, a; *Sutton v. Clark*, 6 *Taunt.* 29; *Lansing v. Montgomery*, 2 *Johns.* 382; *Low v. Mumford*, 14 *Id.* 462; *Rose v. Olliver*, 2 *Id.* 365; *Bishop v. Ely*, 9 *Id.* 249; 1 *Sandf.* 291 a). In an action of trespass brought against two defendants, they severed in their pleas, one pleaded former suit for the same cause and a judgment in his favor; on demurrer, judgment was given for that defendant. The other pleaded the general issue and also the other defendant's judgment in his favor on demurrer. Verdict for the plaintiff against the second defendant sustained. Court holding two sued for tort they may plead separately or jointly, jury may find one guilty, other not; the former judgment is no estoppel to the proceedings and judgment against the other (*Lansing v. Montgomery*, 2 *Johns.* 392; *Viner Abridgment*, 75, § 17). In *Lovejoy v. Murray* (3 *Wall.* [*U. S.*] 1), the supreme court of U. S. decided: "Nothing short of satisfaction or its equivalent can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser who was not a party to the first judgment (*Fow v. Northern Liberties*, 3 *W. & S.* 103; *Railroad Co. v. Mahoney*, 7 *P. Q. Smith* [*Pa.*] 187; *Livingston v. Bishop*, 1 *Johns.* 290; *Osherhaut v. Roberts*,

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8 *Cow.* 43 ; Elliot v. Porter, 5 *Dana*, 299 ; Sanderson v. Caldwell, 2 *Aiken* [*Vt.*] 195 ; Sheldon v. Kibbe, 3 *Conn.* 214 ; Sharp v. Grey, 5 *B. Monroe*, 4 ; Blaun v. Cochran, 20 *Ala.* 320).

III. The right to recover for the eight bales was the right to recover under the testimony of the plaintiff, if the jury believed the same, adverse to that of the defendant upon two principles of law thus : 1st. The act of one tort-feasor, acting in concert with others, is the act of all, in its consequences in law. 2nd. The injurious consequences of a wrong which flow out of it, and which are traceable to it, are to be visited on all the wrongdoers who *ab initio* engaged and embarked in its commission (*Vandenberg v. Truax*, 4 *Den.* 464, and cases there cited ; *Guille v. Swan*, 19 *Johns.* 381).

IV. The verdict was not upon insufficient evidence (*Ynguanzo v. Salomon*, *supra* ; *Dunn v. People*, 29 *N. Y.* 471 ; *Roth v. Wells*, *Id.* 471 ; *Parker v. Jervis*, 3 *Keyes*, 371 ; *Morse v. Sherrill*, 63 *Barb.* 21).

BY THE COURT.—FREEDMAN, J.—The complaint, in stating without elaboration only the ultimate facts on which plaintiffs rely for a recovery of the damage sustained by them by reason of the conspiracy, nevertheless states a good cause of action (*Ynguanzo v. Salomon*, 3 *Daly*, 153).

If the appellant desired greater clearness or particularity, his remedy was by motion to make it more definite and certain. The motion to dismiss the complaint for insufficiency was properly denied.

At the close of the evidence on both sides it appeared that prior to the commencement of this action the plaintiffs had brought an action in the court of common pleas against Hartman to recover the price of the tobacco sold to him, and that Hartman had been arrested under and by virtue of an order of arrest granted in that action upon an affidavit charging him

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with having obtained the goods by means of false and fraudulent representations; that Hartman defended said action, but that after the joinder of issue, pursuant to an agreement entered into between the parties to that effect, the plaintiffs consented to a vacation of the order of arrest, and, in consideration therefor, Hartman permitted them to enter judgment for the amount of their claim with costs. These facts were claimed as a bar to the present action, and were urged as a ground for the direction of a verdict in appellant's favor.

If this claim had been advanced by Hartman for his own protection pursuant to plea and proof to that effect, it would but accord with the current of judicial expression to hold that whatever cause of action plaintiffs had against him, had been merged in the judgment recovered against him (*Cormier v. Hawkins*, Ct. of App., not yet reported).

It is only in the case of partners, where one procures credit for his firm by false and fraudulent representations, that a recovery on contract against the members of the firm jointly is considered no bar to an action against the individual partner to recover the damage sustained by his fraud. In such a case the liability of the offending partner was in extent held similar to that of one who guaranteed the solvency of the firm, but at the same time it was conceded that a guaranty by any person of his own separate debt would be an anomaly (*Morgan v. Skidmore*, 3 *Abb. New Cas.* 92).

But Goldman was not a party to the action which resulted in the judgment above referred to. As to him the plaintiffs made no election in that action. If he is liable to them at all, he is liable as a joint tort-feasor, and as such he is liable, at the election of the plaintiffs, to a joint or separate action (*Rose v. Oliver*, 2 *Johns.* 365; *Lansing v. Montgomery*, *Id.* 382; *Creed v. Hart-*

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man, 29 *N. Y.* 591, affirming 8 *Bosw.* 123; *Kasson v. People*, 44 *Barb.* 347).

His liability as such extends to all the consequences of the tort (*Wehle v. Butler*, 61 *N. Y.* 245, affirming S. C., 35 *N. Y. Super. Ct.* [3 *J. & S.*] 1).

In such cases an answer pleading a former recovery against one, to be good, must also aver actual satisfaction (2 *Phil. on Ev.* [5th Ed.] 114 [*134]; *Osterhout v. Roberts*, 8 *Cow.* 43; *Wies v. Fanning*, 9 *How. Pr.* 546; *Wehle v. Butler*, 35 *N. Y. Super. Ct.* [3 *J. & S.*] 1).

Nothing short of full satisfaction or that which the law must consider as such, can constitute a bar to an action against another joint tort-feasor who was not a party to the first judgment (*Lovejoy v. Murray*, 3 *Wall.* [U. S.] 1, and cases there cited). Thus in *Osterhout v. Roberts* (8 *Cow.* 43), it was held that a plea, that defendant's son had been sued, a judgment rendered against him, and he had been taken in execution and imprisoned sixty days for the same trespass, was bad because the plaintiff had not obtained any satisfaction of his judgment.

The judgment against Hartman having remained fruitless, the facts above alluded to and urged upon the court below on the motion for the direction of a verdict, constituted no bar to the action, nor any ground for the direction prayed for.

During the progress of the trial an exception was taken to the admission of certain statements made by one Philipowsky, but as the appellant did not refer to it, either in his points or on the argument, it may be deemed to have been waived.

The exception to that portion of the charge by which the jury were instructed, that if the plaintiffs were entitled to recover at all, they were entitled to recover for the eight bales, is clearly untenable. The act of one tort-feasor, acting in concert with others, is in judgment of law the act of all, and each is liable for all

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the injurious consequences flowing from it (*Wehle v. Butler*, 61 *N. Y.* 245).

The only question remaining to be considered arises on the appeal from the order denying defendants' motion for a new trial, and relates to the sufficiency of the evidence upon which the jury pronounced their verdict.

No motion was made for a non-suit, or the direction of a verdict, on the ground of insufficiency of plaintiffs' proof, but the case was treated by defendants' counsel throughout, as one which called for submission to the jury. Under such circumstances, this court has repeatedly declined to examine the testimony at large, with the view of ascertaining what grounds may possibly exist for the claim advanced after the rendition of a verdict for the plaintiff for the first time, that, after all, the evidence is so insufficient on plaintiffs' side, or so overwhelmingly preponderating in defendants' favor, as to authorize but one verdict, namely, a verdict in defendants' favor. Inasmuch, however, as the case at bar is a highly peculiar one, and the preponderance in the number of witnesses upon the main question, appears to be so largely in appellants' favor, I deemed it best to relax the rule in this instance, and to make the examination.

From such examination it appeared that plaintiffs' case depends in the main upon the testimony of Hartman. He confessed the fraud, and showed the origin, object and consummation of the conspiracy. His version, in brief was, that Goldman, who is a dealer in plate glass, was in the habit of concocting schemes, whereby persons would obtain credit, and then fail and divide the profits with him; that Goldman encouraged and induced him to procure credit from the plaintiffs and other merchants, and to make the false representations he did make, and that it was agreed between them that, after the goods had been obtained,

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Goldman should sell him out under a judgment entered upon a stale and paid-up indebtedness, and then give him money to settle with his creditors; that, in pursuance of this conspiracy, he did obtain from plaintiffs the goods in question, and dispose of part of them, and that Goldman shared in their proceeds, and sold out the balance under his fraudulent judgment.

Hartman was contradicted throughout by Goldman, and in essential particulars by at least half a dozen witnesses, in such a manner that, if he, Hartman, told the truth, they willfully perjured themselves, so that the learned judge who presided at the trial felt constrained to so instruct the jury. Moreover, Hartman was confronted by an affidavit upon which he had moved in the court of common pleas, though unsuccessfully, for the vacation of the order of arrest against him, and in which he had denied the commission of any fraud.

But Hartman's testimony, as given upon the trial, stands corroborated to a large degree by facts and circumstances, which speak louder than oral testimony. A paper covering of an express package, in which certain proceeds of the fraud had been sent away by one of Goldman's friends and witnesses, pursuant to Hartman's direction, with the direction as to the destination of its contents marked thereon, was produced, and the package was shown to have been delivered at its destination pursuant to the direction. The indorser of the stale and paid-up note, upon which in part the fraudulent judgment was procured, testified that Goldman had admitted to him that it had been paid by a check of \$200.00 and a note for the difference. This check was produced in evidence, and it bore the indorsement of "P. Goldman." The plaintiffs thereupon proved by the receiving teller of the bank in which the check had been deposited, the fact of the deposit for Goldman's account, and the said teller also produced the

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deposit slip bearing as the name of the depositor the words: "P. Goldman." On cross-examination the said teller admitted, however, that though he was familiar with Goldman's signature at the time, he could not swear whether the indorsement of the check was his signature. Goldman then denied that he indorsed the check or made out the deposit slip, which was shown to be in the same handwriting as the indorsement, whereupon he was required, on cross-examination and in the presence of the jury, to write three distinct signatures. This was done, and the jury had the opportunity of comparing them with the disputed signature.

With all these facts and circumstances, and many other incidents not necessary to be referred to here, before the jury, which were all calculated to aid them towards arriving at a correct determination, it is impossible to say that their verdict is against evidence or the weight of evidence. They were properly instructed as to their duty in weighing the evidence, and cautioned not to believe Hartman, unless they found, in the rest of the case, some corroboration which would satisfy them that his testimony was correct; especially as upon the general state of the evidence there was no escape from the conclusion that if Hartman testified truly, at least half a dozen witnesses on the part of the defense committed willful perjury. Notwithstanding these admonitions, which, in view of the law as settled in this State as regards the testimony of accomplices (see *Dunn v. The People*, 29 *N. Y.* 523), contained more than the appellant had a right to demand from the court, the jury, upon their oaths, concluded that their duty required them to believe Hartman. Their verdict, therefore, cannot be disturbed. This case, in its leading features, and legal elements and incidents, is remarkably similar to the case of *Ynguanzo v. Solomon*, 3 *Daly*, 153, subsequently affirmed by the court of appeals, in which the verdict was sustained by the

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general term, for the reason, among others, that fraud is the most subtle of legal elements, and is frequently developed by comparatively trifling facts and circumstances, which, isolated, amount to little, but which, when united by intellectual power, present the charge made clearly and beyond doubt, and that in such a case the conduct of the persons charged, while upon the stand, may have an important bearing upon the determination of the issue by the jury. The most patient examination of the case at bar fails to disclose a reason why this court should apply a different rule, or come to a different conclusion.

The judgment and order appealed from, should be severally affirmed with costs.

CURTIS, Ch., J. concurred.

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GEORGE P. KINGSBURY AND HOWARD GAL-
LUP, PLAINTIFFS AND RESPONDENTS, v.
MICHAEL KIRWIN, DEFENDANT AND AP-
PELLANT.

BROKERS' CONTRACTS, THEIR VALIDITY, &c.

Purchases of cotton for future delivery by a broker for his principal, are not in contravention of the statute against gaming and betting, unless it appears they intended to lay a wager (*Tyler v. Burrows*, 6 *Robt.* 110 ; *Cassard v. Hinman*, 1 *Bosw.* 207).

It was a proper exercise of discretion on the part of the court (warranted by the proofs in this case), to allow the plaintiffs to amend their complaint at the trial, by inserting an allegation of due notice to the defendant, that he would be closed out if he did not keep his margin good (*Lounsbury v. Purdy*, 18 *N. Y.* 521).

And if, after such demand and notice, the defendant failed to keep his margins good, the plaintiff had a right to close the transaction (*White v. Smith*, 54 *N. Y.* 522).

The defendant must be presumed to know the usages pertaining to the matters as to which he made his agreement (*Wells v. Bailey*, 49 *N. Y.* 472), and the proofs establish that he was not ignorant of the meaning of the term "*closing out*" and the mode in which it is done, under like contracts, by cotton brokers.

Before CURTIS, CH. J., and FREEDMAN, J.

Decided March 4, 1878.

Appeal from a judgment, entered on a verdict in favor of the plaintiffs against the defendant, and from an order denying a motion for a new trial on the minutes.

In July and August, 1876, the plaintiffs were cotton brokers, and one of them a member of the cotton exchange. During those months, acting as brokers for

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the defendant, their principal, they sold one thousand bales of cotton for delivery in the months of September and October, 1876, for a certain price, and received from the defendant certain sums of money or margin to cover losses, if any should arise, by increase of the market value of the cotton as might daily occur from the changes of the market.

It was agreed that the defendant's margins should be kept good, and should be paid by him on demand, and that the plaintiffs should continue to act as his brokers, and carry the contracts they should make for him only so long as he did so.

After these sales made by the plaintiffs for future delivery, the market price of cotton advanced, so that if the defendant had bought cotton to cover his sales, and made delivery at their maturity, he would have lost the difference between the two prices, and his margins deposited with the plaintiffs to meet such a loss would have become exhausted.

The plaintiffs claimed at the trial, that when the margins became exhausted, they were liable to the other brokers, to or through whom the sales were made, by the rules and customs of the exchange, for all such losses, and that they demanded from the defendant the deficiency, and notified him that if he did not respond, they would close out the contracts of sale, and that they did so upon his refusal to keep his margins good, and settled the loss with the other parties to the transactions by paying it.

The plaintiffs bring this action, to recover these margins advanced by them for him, and their commissions.

The defendant claimed that the transactions were void under the statute against gaming and betting; that no actual sales or purchases were made; and that no notice of the time, place and manner, of closing out was given him. Various exceptions were taken at the

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trial by the defendant, and he also claimed a return of all moneys paid by him to the plaintiffs as margins.

There was a verdict for the plaintiffs.

Thomas Bracken, for appellant.

Albert Gallup, for respondents.

BY THE COURT.—CURTIS, Ch. J.—The evidence does not sustain the defendant's claim, that these purchases through his brokers of the cotton for future delivery, were in contravention of the statute against gaming and betting. There is no proof of any intention on the part of the plaintiffs not to deliver, or on the part of the vendees not to accept the cotton pursuant to the contracts. Such a contract as the parties to the suit entered into is not objectionable, unless there is evidence to show that they intended to lay a wager (*Tyler v. Barrows*, 6 *Robt.* 110; *Cassard v. Hinman*, 1 *Bosw.* 207).

The permission given at the trial by the court to the plaintiffs, to amend their complaint by inserting an allegation of due notice to the defendant, that he would be closed out, if he did not keep his margin good, was a proper exercise of discretion on the part of the court, and warranted by the proofs (*Lounsbury v. Purdy*, 18 *N. Y.* 521).

The answer admits, in substance, that the defendant ordered the sale of the cotton, and agreed that he would keep the margins good as the cotton advanced in the market. If then, after demand and notice, the defendant failed to keep his margins good, the plaintiffs had a right to close the transaction (*White v. Smith*, 54 *N. Y.* 522).

There was some conflicting testimony as to the demands for margins and as to the notice, but it was left to the jury to find whether the plaintiffs made the

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demands and gave the defendant notice of the time and place in which they intended to close out the transaction, and also as to whether the defendant put up the margins he was notified to put up, and there is no just reason shown for disturbing the conclusion of the jury, which was adverse to the claims of the defendant in these respects, and which was in accordance with the weight of the evidence.

The defendant must be presumed to know the usages, pertaining to the matters as to which he made his agreement (*Wells v. Bailey*, 49 N. Y. 472). The usages in respect to cotton brokers and the cotton exchange were in evidence, and also the fact that the defendant had been closed out on a former occasion. He had such previous knowledge of the nature of the business, that he is not in the position of a person of inexperience, and ignorant of the meaning of the term "closing out," and the mode in which it is done, by going into the market, and buying the cotton, at the lowest price at the time that it could be bought, and using that in settlement of the contract with the buyer on the principal contract.

The court charged the jury that if the plaintiffs failed to prove to them that due notice was given to the defendant, that then the plaintiffs violated their duty to the defendant, and that he was entitled to recover back the amount of margins he paid, with interest.

There are some exceptions to the admissibility of evidence, but they are not well taken. The refusals of the judge to charge as requested by the defendant, are sustained by our views of the law, and by what the testimony at the trial establishes. The same should be said as to those parts of the charge to which the defendant excepts.

The court left it to the jury to determine whether, as the plaintiffs claimed, the margin of \$800 was de-

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manded of the defendant on Saturday, also, whether he was told he must furnish that margin on Monday by ten o'clock, and thereupon acquiesced in it, and promised to do so. The jury were properly instructed that if they found such to be the facts, it was a sufficient and reasonable notice, because there was a time to which the defendant agreed, and an amount as to which he was notified.

The judgment and order appealed from should be affirmed with costs.

FREEDMAN, J., concurred.

LEWIS ROBERTS, PLAINTIFF AND APPELLANT, v.
HENRY WHITE, ET AL., AS EXECUTORS, &C.,
DEFENDANTS AND RESPONDENTS.

INJUNCTION ORDER, DAMAGES THEREBY.

PRACTICE IN ASCERTAINING THE SAME.

An order of reference to ascertain the damage sustained by reason of an injunction, entered before judgment in the action, is made prematurely, and is a formal irregularity; but that irregularity is waived, when the order of reference is entered by the consent of parties (*Lawton v. Green*, 64 N. Y. 326). This irregularity is also waived when the order has been entered and proceedings taken upon the same, without objection, and with the acquiescence of all parties, as in the case at bar.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided March 4, 1878.

Appeal by the plaintiff from an order of reference made October 4, 1874, and also an appeal by the plaintiff from an order made on June 8, 1877, confirming the report of the referee.

Opinion of the Court, by CURTIS, Ch. J.

Wm. R. Martin, for appellant.

P. W. Ostrander and *F. R. Sherman*, for respondents.

BY THE COURT.—CURTIS, Ch. J.—This action was commenced on June 10, 1864, to determine the title to a division or party wall, and restrain its demolition by the defendants, who were constructing an immediately contiguous building, a side wall of which was to replace this division wall. The same day an injunction was granted, restraining the defendants from interfering with the wall in question. On September 19, following, an order was made vacating the injunction, and this order was affirmed on appeal October 31, in the same year, the defendants being stayed during the pendency of the appeal. On October 2, 1865, a decision was rendered after a trial of the action at special term upon its merits, in favor of the defendants. Before the entry of judgment on this decision, and on October 7, 1867, an order of reference was made to Henry Nicoll, Esq., and substituting him in place of George C. Goddard, Esq., as sole referee, to ascertain what, if any damages, the defendants had sustained by reason of the injunction issued at the instance of the plaintiff.

Under this order of reference of October 7, 1867, and never appealed from, both parties proceeded and contested the question of damages from December 23, 1867, to March 28, 1871. The referee under this order, after having taken the testimony, made his report on July 13, 1871, and assessed the defendant's damages at \$8,085.24.

This amount being in excess of the amount of the undertaking, which was for \$5,000, was erroneous, and the matter was referred back by the court to the same referee, to ascertain the damages, and with directions

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to report the evidence already taken on the former order of reference in respect to damages, with the objections and exceptions also then taken by either party, and with leave to either party to furnish further testimony, and to the plaintiff to file exceptions to the report of the referee, and to any rulings by him made, and reserving all questions to be heard and determined on a motion to confirm the report. The order thus referring the matter back to the referee, was made October 4, 1875, and is the order first appealed from, by the plaintiff. In the mean time, and on June, 3, 1874, judgment in the action was entered in the defendant's favor.

The referee then proceeded under this further order of October 4, 1875, both parties appearing before him, and additional evidence being taken for the plaintiff and the defendants. The referee reported the former proofs and additional evidence, all of which was under oath, and that the damages were over \$5,000, but in view of the limitation of the undertaking, he assessed the damages at \$5,000.

On June 8, 1877, this report was confirmed by the court, and the damages assessed at \$5,000, and from this order of confirmation the plaintiff appeals. This is the second order appealed from by the plaintiff.

Two principal questions are raised by these appeals. First. Should the report of the referee be set aside, because the original order of reference was premature, and made before instead of after the entry of judgment? Second. What are the damages sustained by the defendants on the merits?

In the case of *Lawton v. Green* (64 N. Y. 326), it was held that making an order of reference prematurely, as this was made, under section 222 of the code, to ascertain damages upon an undertaking given upon the granting of an injunction, was a formal irregularity

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which was waived by the consent to the order of reference.

In the present case, both the original order of reference to Mr. Nicoll, and the subsequent order which is appealed from, appear, upon their face, to have been made with the acquiescence of the plaintiff, if not upon his consent or motion. Nothing indicates that there was any objection raised on the plaintiff's part to the making of these orders.

If the original order was, as appears, formally irregular, neither party objecting to it, and both proceeding under it for over three years, and taking testimony and neither appealing from it, it must, in view of the decision in *Lawton v. Green*, be regarded as acquiesced in, and that the irregularity was waived.

Again, in respect to the subsequent and supplementary order of reference, which was appealed from, it cannot be held irregular upon the ground that it was, like the original or first order, prematurely made, as final judgment had been entered in the action long previously to its being made. Neither can it be held to be prejudiced by the irregularity in this original order, because that must be considered, for the reasons above stated, to have been waived.

Section 222 of the code directs that the damages caused by an injunction "may be ascertained by a reference or otherwise, as the court may direct." This language confers full power upon the court to both order a reference for this purpose, or to proceed otherwise. It was not intended to be construed as precluding the court, upon the coming in of the report of the referee, especially when, as in this case, the damages were reported in excess of the limit of the undertaking, from referring the matter back, and by a further order directing the referee to report *de novo* as to the damages, and also to report to the court the entire evidence taken by him under its direction. Th

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case may be one in which justice to the parties, and due information to the court, requires this very course of procedure when the action of the referee comes up for confirmation. It is in consonance with what is reasonable, and with the practice of the courts under such circumstances, and accords with the provisions of this section of the code.

The referee's return under the original order of reference, does not show that any objection was made by the plaintiff, until the close of the testimony, that there was an irregularity in the making of the order, or in proceeding under it. At the first hearing under the second order, the plaintiff objected to the evidence in the referee's previous return, but assigned no ground for the objection.

The course taken by the plaintiff in respect to the orders of reference, and the proceedings on his part under them, must be construed, in the light of *Lawton v. Green*, as a waiver of the irregularity. If this conclusion is correct, it follows that the order appealed from, confirming the referee's report, and overruling the exceptions of the plaintiff, should also be affirmed, unless there is some difficulty upon the merits.

The remaining question is, as to the amount of damages sustained by the defendants. The evidence supports the finding of the referee in this respect, that the damages exceeded the sum specified in the undertaking, and the referee in consequence reports only as damages the smaller amount mentioned in the undertaking. It is true, as the referee states in his very carefully considered opinion, that the party claiming damages must do all he can to lessen them. There must be a reasonable construction given to this view. The perusal of the testimony fails to satisfy me that it would be reasonable and just for the defendants to be compelled to go on with their building, shoring up the floor timbers and corners on one side, and then,

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afterwards, when the injunction was dissolved, have to drive piles, and construct a foundation, and build the wall upon it to meet the floor timbers. The evidence of the witnesses Mr. Ross and Mr. Demarest satisfies me, that to incur this extra expense, and to risk cracking and damaging the remaining walls, by the action of a pile driver operating necessarily inside of the unfinished structure, would have been imprudent, and no part of the duty of the defendants. There was no negligence on their part, in awaiting the dissolution of the injunction, which they had reason, as the result shows, to suppose would be dissolved, and that too, very probably, at an earlier day that it was dissolved.

There were some exceptions taken by the plaintiff to the rulings of the referee upon the admission of testimony, but they do not call for the reversal of either of the orders appealed from.

The plaintiff objects that there was testimony given on the reference and reported to the court by the referee, which was not subscribed by the witnesses. This, like the premature making of the order of reference, is a formal irregularity, a mere matter of practice, the remedy for which is by motion for the purpose of securing its correction (*National State Bank of Troy v. Hibbard*, 45 *How. Pr.* 287). The object of exceptions is to bring up the merits of controversies for review, and not to correct omissions in mere matters of practice, as is justly said by DANIELS, J., in the opinion in the above case. This objection of the plaintiff was made at the argument, and is not presented by any exception, nor does it appear that the attention of the referee was called to it.

The two orders appealed from should be affirmed with costs.

FREEDMAN, J., concurred.

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CHAUNCEY KILMER, PLAINTIFF AND RESPOND-
ENT, v. JAMES H. SMITH, ET AL., DEFENDANTS
AND APPELLANTS.

REFORMATION OF A WRITTEN INSTRUMENT BY A COURT
OF EQUITY.

The exercise of the power of a court of equity to reform the language of a written instrument, must be based upon the fact, appearing conclusively, "that both parties to the instrument agreed that it should be in a different form from that expressed by the writing (Jackson v. Andrews, 59 N. Y. 247; Mead v. Westchester Fire Ins. Co., 64 *Id.* 455).

Where the instrument sought to be reformed is a deed of conveyance, the contract of sale executed before the execution of the deed in question, and which provided for it, is binding upon the parties. Its terms, whereby provision was made as to the form and character of the deed to be executed, must be deemed to be obligatory and expressing at the time, the understanding and agreement of the parties.

In this case the preliminary contract did not impose upon the respondent the personal obligation of the payment of certain existing mortgages on the premises conveyed, but did provide that the premises should be conveyed, subject to the lien of said mortgages. The deed in question, by its terms, imposed upon the respondent the personal obligation of the payment of those existing mortgages, and in this respect was a departure from the provisions of the preliminary contract, and it not appearing that this contract was modified in its terms by the parties, and it appearing that the deed was accepted by the respondent as the fulfillment of that contract, and without knowledge of any departure therefrom,—*Held*, that the deed must be reformed so as to make its terms correspond to the contract.

No existing custom or practice to have such a clause inserted in the deed, although not specifically expressed in the contract, would justify, in a legal or moral point of view, an act whereby the grantor was kept in ignorance of a change, the terms of which subjected him to a personal pecuniary liability not pro-

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vided for in the preliminary contract; and the evidence offered upon this point was very properly excluded.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided March 4, 1878.

Appeal by defendants from a judgment directing the reformation of a deed, executed by the defendant Smith and wife to the plaintiff, by striking out a clause by which the plaintiff assumed and agreed to pay three mortgages and interest thereon, being liens on the premises conveyed, as a part of the consideration or purchase money therefor.

The action was tried at the special term, and the court made the following findings of fact and conclusions of law.

FINDINGS OF FACT.

I. That on or about the 14th day of April, 1874, the defendants James H. Smith and John A. Dake, made and executed the written contract specified in the complaint, and a copy of which is annexed thereto.

II. That subsequently, and before the time appointed for the execution and delivery of the deeds therein provided, said Dake assigned his interest in that part of said contract which provided for the conveyance of the four lots situate on Seventy-seventh street, mentioned in said contract, to the plaintiff Kilmer, as collateral security toward the payment of an indebtedness then due by said Dake to said Kilmer, and directed the deed of said lots to be made to said plaintiff, and which was assented to by said defendant Smith, and thereupon, in consideration of the premises, the plaintiff duly executed and delivered to the parties, a release and satisfaction of a mortgage, which the plaintiff then held as a security for said Dake's indebtedness to him,

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upon the house and lot owned by said Dake, situate in Fifty-seventh street, and the same house and lot which formed a part of the subject matter of the contract before mentioned.

III. That neither said Dake, nor the plaintiff Kilmer, ever at any time agreed to assume and pay the three several mortgages upon the four lots in said 77th street, mentioned in said contract, and specified in the complaint, nor either, nor any part of either of them, nor did said Dake, or said plaintiff, ever, at any time, in any way assume the payment of either or of any part of said three several mortgages.

IV. That the clause contained in the deed of the said four lots in Seventy-seventh street, made by the defendants, James H. Smith and Annie M. Smith, to the plaintiff, set forth in the complaint herein, and therein particularly complained of, and which is in the words following, viz.: "Which said three several mortgages, together with the interest thereon, the party of the second part hereby expressly assumes and agrees to pay off and discharge the same, forming a part of and having been deducted by the said party of the second part from the consideration or purchase money hereinbefore expressed," was inserted in the said deed by said defendant Smith, without the knowledge or consent of the said Dake and the plaintiff, or either of them, and the plaintiff took said deed and caused the same to be recorded in ignorance of the fact that the said clause, or any clause or words of like import or effect was contained therein, and supposing and understanding that the said deed in that particular (as in all other respects) corresponded to the express terms of the said written contract, and the insertion of said words and clause above recited in said deed was unauthorized by the terms of the said contract and was a fraud upon said plaintiff.

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CONCLUSIONS OF LAW.

That the plaintiff is entitled to judgment in this action as demanded in the complaint.

That the said deed made by the defendants James H. Smith and Annie M. Smith to the plaintiff before mentioned be reformed and corrected by striking out therefrom and canceling the clause contained therein, and which is in the words following, viz. : " Which said three several mortgages, together with the interest thereon, the party of the second part hereby expressly assumes, and agrees to pay off and discharge the same, forming a part of, and having been deducted by the said party of the second part from the consideration or purchase money hereinbefore expressed," and the agreement and covenant purporting to be made and created, thereby requiring the plaintiff to pay off the said three several mortgages upon the said four lots in Seventy-seventh street, mentioned in said contract and in said complaint, be adjudged and decreed to be canceled and null and void, and the register of deeds in and for the county of New York be ordered to change and correct the record of said deed on the record thereof in his office, by striking out and erasing and canceling the before-recited clause and words now contained therein.

And it appearing that none of the defendants in this action have answered and defended therein except the defendants James H. Smith and Annie M. Smith, the plaintiff is entitled to have judgment against the said defendants, James H. and Annie M. Smith, for his costs of this action.

Julian Davies and Everett P. Wheeler, for appellants.

Walter S. Cowles, for respondent.

Opinion of the Court, by CURTIS, Ch. J.

BY THE COURT.—CURTIS, Ch. J.—It is urged on the part of the appellants, and very justly, that in the exercise of the power of a court of equity to reform the language of a written instrument in the absence of fraud, it must be conclusively established that both parties agreed that it should be in a different form from that expressed in the writing (*Jackson v. Andrews*, 59 *N. Y.* 247 ; *Mead v. Weschester Fire Ins. Co.*, 64 *Id.* 455).

The contract of sale, executed before the execution of the deed in question, was binding upon the parties to the latter. By its terms provision was made as to the form and character of the deed to be executed, which must be deemed to be obligatory, and as expressing the understanding and agreement at the time of the parties.

By the contract of sale, preliminarily executed for greater caution and certainty, and to define and protect the duties and rights of the respective parties, and in fulfillment of which the deed was agreed to be executed, it will be seen that no obligation was imposed upon the respondent, to assume the payment of the mortgages upon the premises conveyed. The deed was to be given of the property simply subject to these existing mortgages.

The deed sought to be reformed by reason of this departure from the provision of the contract, differs in this respect from those cases where a change is sought in the absence of a contract of sale, that the parties to this instrument have preliminarily reduced to writing, and formally declared their understanding and agreement, as to the obligations resting upon each party.

Unless some modification or change was agreed to by the parties, it was clearly the duty of the appellants, Smith and wife, to have delivered their deed to the respondent with the subject clause only, and not to have inserted an additional and uncalled-for clause, by

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which the plaintiff agreed to assume and pay these mortgages.

The court found, at the trial, that neither the plaintiff nor his assignor Dake at any time agreed to assume or pay the three mortgages, or any part of them ; that the insertion in the deed of the clause to that effect was without the knowledge of either the plaintiff or Dake ; that the plaintiff took and recorded the deed in ignorance that it contained such a clause, and supposing that it corresponded with the contract ; that the insertion of such clause was unauthorized by the contract, and was a fraud upon the plaintiff.

If the evidence sustains these findings of the court it tends strongly to support the judgment for the reformation of the deed.

The plaintiff testifies, that he did not know that the deed failed to agree with the contract, but supposed it did agree with it ; that he would not have taken it if he had known it contained the covenant in question ; that the deed was handed to him by the defendant Smith, a day or two before it was to be delivered, who said he wanted him to examine it, and that it was drawn up according to contract ; but that he had no distinct recollection of reading it, and that he had no counsel in closing the sale. The witness further testified, that he handed it to Mr. Cowles when delivered, to put on record, with whom it remained until the following May, when witness discovered the clause, and directed Mr. Cowles to take steps to have the deed reformed. Mr. Dake testifies that he did not know or have notice, that this clause was inserted in the deed, and that no change, verbal or otherwise, to his knowledge was made in the contract after the written contract was made.

Mr. Cowles testifies he went to the office, where the deed was delivered, with some certificates of continuations of searches, as his office boy was out, and he had

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no one to send ; that he had not seen, and did not examine the contract, that he did not examine the deed or the title of the property, and first had his attention called to this clause in the deed, the last of May, or early in June, in the year following.

On the part of the appellant, Mr. Smith, one of the appellants, testifies, that he did not examine the contract to see if there was this clause in it, nor did he know whether there was such a clause in it after he signed it ; that he directed his attorneys to put this clause in the deed, though he then knew the clause was in addition to what was in the written contract ; and that he had it inserted for the purpose of making the plaintiff personally responsible for the mortgages, and that he was advised by his counsel, who had inspected the contract, that otherwise the plaintiff would not be liable to pay the mortgages. He further testified that this direction to his counsel was given in pursuance of his understanding of the original agreement, and that he did not notify Kilmer of the insertion of this clause in words, or otherwise than by presenting him the deed.

The attorney who drafted the deed testified that when the contract was brought to the office he observed that this clause was not in it ; that Mr. Cowles examined the deed very critically and very carefully, and made no objection to it ; that he did not know that he called Mr. Cowles' attention to the assumption clause, but that he recollected saying to him that the "deed, as we understand it, was expressly according to the views and understanding of the parties."

One of the counsel for the appellant Smith who was present at the closing of the contract, testified that he has no recollection of this clause being called to the attention of any party in the office that day, or that Mr. Cowles examined the deed.

The plaintiff Kilmer, and Mr. Dake, being recalled,

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testify that nothing was said in their hearing about this assumption clause in the deed, on the day of the passing of the deeds ; and Mr. Cowles further testified, he was there by accident, and had no idea of that clause being there.

There is not much conflict in this evidence. Even if Mr. Cowles did examine the deed carefully and critically, it matters little, for he was not employed by the respondent to do so ; nor is there any proof that the respondent held him out, or represented that he was his counsel to protect his interests in passing the deeds or to act for him in any respect, except to have some searches continued and brought there that day, and to take the deed for the purpose of having it recorded.

The appellant Smith's alleged understanding, that the respondent was to assume the mortgages, and pay them, if any such existed, is not shown to have been based upon any knowledge or supposition as to what was contained in the original contract, or upon anything subsequently passing between him and the respondent. It was, at best, a vague idea on his part, of which the respondent was ignorant, and which could neither be supported nor inferred from anything the respondent had done or said. Its existence forms no reason for releasing the appellants from giving a deed in accordance with the obligations of the contract.

The evidence shows that the respondent was mistaken as to the contents of the deed delivered to him ; and that he was misled into its acceptance, and it supports the findings of the court.

The memorandum upon the back of the contract, signed by the parties when the deeds were passed, to the effect that the contract was completed and merged in the deeds, places the appellants in no better position. It was prepared and presented in furtherance of, and to give effect to, the clause inserted in the deed.

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It is evident, that if the respondent had not been mistaken and misled as to the agreement of the deed with the contract, he never would have signed it. If the disputed clause in the deed cannot be sustained, except by the operation of that indorsement, it has to rest upon a basis that partakes of all the elements that pertain to the insertion in the deed of the clause itself. It in no way relieved the appellants, whose duty it was, under the contract, to deliver the deed, from their obligation to deliver such a one as the contract called for, and it in no way obviates the effect of any disingenuousness, or concealment, or suppression, or misrepresentation, as to the deed tendered in fulfillment of the contract.

One of the counsel of the appellant, at the passing of the deeds, was asked on his direct examination in regard to the clause in dispute this question: "Was it not at that time, and had it not been for years, very common, in the city of New York to have such a clause inserted in a deed, although it was not specifically expressed in the contract?" The ruling of the court sustaining the objection to the question that it was immaterial, was excepted to. I am not aware that any such practice exists, or that it is ever done under such circumstances as the proofs disclose in this case. Nothing would justify, in a moral point of view, such an act, where the grantee is ignorant, and kept in ignorance of the change by which it is sought to subject him to a pecuniary liability. No custom or practice would warrant it, and the existence of any such custom could not be construed to sustain such a wrong. It was properly excluded.

There are other exceptions to the admission of evidence, but none that are tenable.

The objection that if the deed is reformed, the parties cannot be restored *in statu quo*, because the property has depreciated since the making of the deed, is

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without force. The reformation of the deed restores the parties to their legal rights, and whether the property has increased or decreased in value has no relation to the question affecting the legality and existence of the assumption clause in the deed to one of them.

The judgment appealed from should be affirmed with costs.

FREEDMAN, J., concurred.

ABRAHAM VAN DOLSEN, ET AL., PLAINTIFFS AND
RESPONDENTS, v. WILLIAM P. ABENDROTH,
IMPLEADED, &C., DEFENDANT AND APPELLANT.

U. S. DISTRICT COURT, PROCEEDINGS THEREIN IN BANK-
RUPTCY, JURISDICTION, &c.—RES ADJUDICATA.

In this case the plaintiffs sought to recover judgment against the defendant upon a promissory note made by the firm of Griffith & Wundram, upon the ground that defendant was a general partner of that firm. Defendant claims by his answer to have been only a special partner in that firm, and to have been adjudged as such, in proceedings in bankruptcy against said firm in the U. S. district court, to which proceedings the plaintiffs were parties, and that they were bound by the said adjudication.

Held by the court, that the adjudication in the U. S. district court appears to embrace all the elements to sustain the defense of *res adjudicata*. The court was of competent jurisdiction, and the parties were before it to have their respective rights determined; they were actors and participants in the proceedings, and also in the administration and disposition of the property and assets affected by the decision of that court, and the same question sought to be raised and decided in this action was then and there determined, and under such circumstances it would be inconsistent with well-established rules, that the parties or their privies should be allowed to again litigate a

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subject matter which was or which could have been determined in the proceedings in the U. S. district court. The facts pleaded in defense are sufficient.

The case of *Durant v. Abendroth* (reported in 41 *N. Y. Super. Ct.* [9 *J. & S.*] 53), wherein this court held that this defendant was a general partner in the firm of Griffith & Wundram, noticed and reviewed by the court.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided March 4, 1877.

Appeal by the defendant Abendroth from so much of the interlocutory judgment rendered herein, at a special term of this court, as determines that the new matter alleged in his answer as a third defense upon its face does not constitute a defense, and is upon its face insufficient in law as a defense, and that the demurrer to such new matter, alleged as a third defense, is sustained and allowed.

And also from so much of the interlocutory judgment as determines that the new matter alleged in his answer as a fourth defense, upon its face does not constitute a defense, and is upon its face insufficient in law as a defense, and that the demurrer to such new matter alleged as a fourth defense is sustained and allowed.

And also from so much of the interlocutory judgment, as amended by the order of October 18, 1877, as provides that defendant shall pay plaintiff \$10 costs of the motion to resettle the interlocutory judgment when it appeared that such judgment had been entered without notice to defendant.

This action was commenced in April, 1877, upon a promissory note made by the firm of "Griffith & Wundram," and signed by that firm's name, and the defendant Abendroth is sought to be charged as a general partner in that firm, he claiming by his answer to be

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only a special partner, and to have been adjudged to be such in proceedings in the U. S. district court, to which the plaintiffs were parties and by which they were bound.

The third and fourth defenses pleaded in the defendant's answer were as follows :

And for a further and third defense :

First. On or about November 23, 1872, voluntary and involuntary proceedings were duly instituted in district court of the United States for the southern district of New York, in bankruptcy, wherein the said firm of Griffith & Wundram was duly adjudged and declared to be bankrupts, as by said proceedings, a reference being had thereto, will more fully and at large appear.

Second. The claim of the plaintiffs arose upon a money demand on contract, and was provable in said proceedings in bankruptcy, under and by virtue of the provisions of the act of congress of the United States, entitled " An Act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and of the acts supplementary thereto, or amendatory thereof. Plaintiffs were then the lawful owners and holders of said claim, and were duly made parties to said proceedings in bankruptcy ; they made due proof of their debt against said firm in bankruptcy, and the same was duly allowed and filed.

Third. Both before and after the plaintiffs had duly presented and filed their said claim, and while they were owners thereof, such proceedings were had, to which the plaintiffs were parties, that it was duly adjudged and determined, that John Griffith and George W. Wundram, the bankrupts in this bankruptcy, were the general partners in the limited partnership of Griffith & Wundram, of which William P. Abendroth, this defendant, was the special partner.

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Fourth. In the course of said proceedings in bankruptcy, a meeting of the creditors of the said special partnership of Griffith & Wundrum was duly held, and in it the plaintiffs participated; at said meeting, this defendant was duly chosen the assignee in bankruptcy of said firm, and thereafter, he duly qualified as such, and entered upon and discharged the duties of his said office; all of which was done by and with the assent of the plaintiffs, who were then and there the lawful owners and holders of said claim.

Fifth. After said adjudication that said firm of Griffith & Wundrum was a limited partnership, of which this defendant was the special partner, and the appointment of this defendant as assignee in bankruptcy, this defendant, in the course of the discharge of his duties as such assignee, duly paid to the plaintiffs, they then being the owners and holders of said claim, a dividend of six per centum upon the claim in suit, out of the proceeds of the assigned estate of Griffith & Wundrum, being the sum hereinbefore alleged to have been paid on said claim, and the plaintiffs accepted the said payment.

Sixth. The said adjudication that Griffith and Wundrum were general partners, and this defendant was special partner, was made more than one year before the commencement of this action, and the same now remains in full force and effect.

Seventh. This defendant pleads the said proceedings in bankruptcy, and each and every part thereof, and the adjudication and determinations therein, and the acts of the plaintiffs in bar and in abatement of this action.

For a fourth and last defense:

Before the commencement of this action, another action was brought in the court of common pleas in and for the city and county of New York, in the State

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of New York, for the same cause of action as set forth in the complaint herein, in which said action the plaintiffs herein were plaintiffs, and John Griffith and George W. Wundram, two of the defendants herein, were defendants, and were sued as forming the partnership of Griffith & Wundram.

The said action is now pending and undetermined, having been stayed by order of the United States district court in bankruptcy in the matter hereinbefore forth.

Wherefore this defendant demands judgment, that the complaint be dismissed as against him, with costs.

The plaintiffs demurred to the new matter contained in the answer of the defendant Abendroth, and alleged as a third defense, upon the ground that, upon its face, such new matter did not constitute a defense.

The plaintiffs also demurred to the new matter contained in the answer of the defendant Abendroth, and alleged as a fourth defense, upon the ground that, upon its face, such new matter did not constitute a defense.

The demurrer of the plaintiff to these defenses was sustained and allowed, and an interlocutory judgment upon such decision entered, which was subsequently amended, by granting leave to the defendant Abendroth, to serve an amended answer upon payment of of costs, and ten dollars costs of the motion made for a resettlement of the interlocutory judgment, and for such leave.

Wm. Henry Arnoux, for appellant.

Carlisle Norwood, Jr., for respondents.

BY THE COURT.—CURTIS, Ch. J.—It may be true

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that in a similar action, entitled *Durant v. Abendroth* (reported in 41 *N. Y. Super. Ct.* [9 *J. & S.*] 53), this court held that the defendant Abendroth was a general partner in the firm of Griffith & Wundram, he having claimed to be only a special partner, and that such decision was affirmed by the court of appeals in March, 1877. But if we look beyond the record before us, to determine to what extent the action in which the decision was so made and affirmed was similar to this, or governs this, it will appear that the question was not considered, as to how far the adjudication of the United States district court that the firm of Griffith & Wundram was a limited partnership, and Abendroth, the defendant, was the special partner, was binding upon these plaintiffs and the other creditors of such firm, who were parties to such proceedings and adjudication.

The chief question raised by the demurrers is whether the proceedings and adjudication in the United States district court, considered as truly stated in the answer, constitute a matter judicially acted upon and decided, by which the plaintiffs are precluded from raising the question as to the status of the defendant Abendroth, in the firm of Griffith & Wundram.

The answer alleges the due institution of proceedings in the United States district court in bankruptcy, under the act of congress of March 2, 1867, and the acts supplementary and amendatory thereto, to which proceedings the plaintiffs were parties, and in which they proved and established this claim now sued upon, and that in these proceedings it was duly adjudged and determined, that George Griffith and George W. Wundram, the bankrupts, were the general partners in the limited partnership of Griffith & Wundram, of which William P. Abendroth, this defendant, was the special partner.

The answer further states that the plaintiffs partici-

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pated in a meeting of the creditors of such special partnership, at which the defendant Abendroth was chosen assignee by and with the plaintiffs' assent, and that after such adjudication they received a dividend out of the proceeds of the assigned estate of Griffith & Wundram.

It would thus appear that the plaintiffs were parties to these proceedings, in which it was competent for them to have had the defendant Abendroth adjudged a general partner, if they had interposed such a claim, and established it by proof. But it appears that they did not do so, for reasons, if any, not apparent in the pleadings. They did, however, participate in the fruits of the adjudication in bankruptcy.

By this adjudication the defendant Abendroth was held to be a special partner, and hence in the position which the State law declares, of not being liable for the debts of the partnership beyond the sum contributed by him as capital. The adjudication that the firm of Griffith & Wundram was a limited partnership, limited the plaintiffs, and other creditors, who were parties to the proceedings, to a remedy against the sum contributed as capital to the firm, as far as the defendant Abendroth is concerned. If they deem themselves entitled to anything more, or that such adjudication was not in accordance with the proofs, they should have availed themselves of the relief and of the means of review afforded them by the acts of Congress affecting proceedings in bankruptcy, and not wait and participate as far as possible in benefits afforded them by the determination of the federal court, and then resort to a State court, upon the theory that the former erred in passing upon the character of the partnership.

This adjudication appears to embrace all the elements, to sustain the defense of *res adjudicata*. The court was of competent jurisdiction. The parties were before it to have their respective rights determined.

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They were actors in the proceedings, and actors and participants in the administration and disposition of the property and assets, affected by its judicial decision. The same question sought to be raised anew in this action, was there determined. Under such circumstances, it would be inconsistent with well-settled rules, that the parties or their privies should again be allowed to litigate a subject matter which was, or even which could have been determined, in the proceedings in the United States district court.

It is enough that the facts pleaded in the third defense are sufficient to confer jurisdiction upon the United States district court, and it is not for us to consider, on this appeal, whether in point of fact the plaintiffs can, as they claim, show that this defendant was a third general partner, neither petitioner nor petitioned against, and that consequently there was no sufficient jurisdiction conferred upon the court. We cannot look beyond the sufficiency of the allegations of the defense as stated in the answer.

In reference to the fourth defense, setting forth that John Griffith and George W. Wundram, were sued for the same cause of action as in the present suit, and that the same is now stayed by order of the United States district court, the same principle must govern. The act of congress authorizes this stay. It is a part of the proceedings in bankruptcy. Under it the assets of the firm, including the capital contributed by the defendant Abendroth, were held and protected for the benefit of the creditors of the firm. The plaintiffs, having been parties to the adjudication confirming such stay, and participants in the subject matter of the proceedings, are precluded from maintaining an action for the same cause, and against parties who are held to be the same parties under the adjudication which binds the plaintiffs.

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part of the plaintiffs, should be directed to the federal court, and on the basis of the proceedings there already had. To nullify this stay would be, in effect, to hold that the matters pleaded in the defendant's third defense were insufficient, and would tend to open the State courts to the review of questions collaterally, that by proceedings under the bankrupt laws have been determined and put at rest in the federal courts.

The suit in the court of common pleas originally operated as to the defendant, Abendroth, to the extent of his capital in the firm of Griffith & Wundram. The present suit can extend no further, if it is governed by the existing adjudication. The maintenance of the former suit being prohibited by law, to hold that by bringing a new suit for the same cause of action, the effect of the existing adjudication can be avoided, would be to sustain an evasion of the bankruptcy laws and of the just and competent adjudication in this respect rendered thereunder.

The question as to the costs of the motion was properly determined in the discretion of the court at special term. So much of the interlocutory judgment appealed from other than that directing the payment to the plaintiff of \$10 costs of motion is reversed with costs.

FREEDMAN, J., concurred.

JOHN H. CHEEVER, PLAINTIFF AND APPELLANT,
v. THE GILBERT ELEVATED RAILWAY
COMPANY, DEFENDANT AND RESPONDENT.

I. Corporation.

1. LOANING MONEY ; AUTHORITY TO SO DO.

- (a) Has authority to loan money *to aid in a work auxiliary to its main business.*

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1. MISAPPROPRIATION BY BORROWER, EFFECT OF.

(a) If loaned for such purpose, the *lender is not responsible* for misappropriation.

2. WANT OF AUTHORITY IN CORPORATION.

(a) WHO MAY NOT TAKE ADVANTAGE OF.

1. One who has had the benefit of the act done without authority, cannot.

3. INNOCENCE, PRESUMPTION OF, APPLIES TO CORPORATIONS.

(a) Corporations are entitled to the benefit of the rule which imputes innocence rather than wrong to the conduct of man.

4. OFFICERS OR AGENTS, ACTS OF.

(a) Corporation *bound by*, when done in the ordinary discharge of their official duty, *though not authorized or executed under its corporate seal*.

HELD, UPON ABOVE PROPOSITIONS,

that a treasurer who, with the assent of the president and vice-president, but without the authority of a by-law, resolution of the board of directors, or other assent of the governing body, loaned money of the corporation to aid in a work auxiliary to its main business, the loaning of money being in the ordinary discharge of the official duty of those officers, was not liable to the company for the money loaned, in the event of the borrower not repaying it.

5. REVISED STATUTES, PART 1, TITLE 4, § 4.

(a) Prohibition against assigning property or choses in action to an officer or stockholder for the payment of a debt.

1. WHAT FALLS WITHIN PROHIBITION.

(a) *Charging to the debit of an officer* and assigning to him an apparently lost debt due to the corporation (his credit side of the account being greater than the debt) for which he, by reason of want of authority to do, or neglect of duty in doing, the act, or transaction, out of which the debt arose, is liable to the corporation as well as the debtor, so falls.

SUBROGATION.—Such a transaction does not operate to subrogate the officer to the company's rights against its debtor.

AGENCY.—Such a transaction will not put the officer in the position of an agent who can sue for money or property of his principal, paid or transferred under such circumstances as that it is recoverable back, and appropriate the proceeds of the suit to his own use.

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Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided March 4, 1878.

Appeal from judgment dismissing the complaint entered upon a referee's report.

This is an action brought by John H. Cheever against the Gilbert Elevated Railway Company, to recover the sum of \$10,816.77, with interest from the day of May, 1873. The complaint alleges that, on or about March 13, 1873, and on divers dates thereafter, to and including August 2, 1873, the New York, Boston and Montreal Railway Company, a corporation organized under the laws of the State of New York, loaned and advanced to the defendant and to its officers and agents, at its request and for its use, and paid, laid out and expended to and for the defendant's use and at its request, divers sums of money, amounting to \$10,816.77, which the defendant promised to repay to the said New York, Boston and Montreal Railway Company, on demand, with interest from the respective dates at which the moneys were so loaned; that the indebtedness of the defendant to the said New York, Boston and Montreal Company, has been duly assigned to and is vested in the plaintiff; that the defendant has not paid the same or any part thereof, although often requested so to do, and that the whole sum as above expressed is now justly due and owing to the plaintiff from the defendant. Judgment is demanded accordingly. Issue is taken upon these allegations. The New York, Boston and Montreal Company was a railway company, having its southern terminus at the Harlem river, near High Bridge. The defendant was also a railway company, intending to build a road from the Battery to the Harlem river, to connect with the New York, Boston and Montreal

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Railroad. George W. Brown was president, John Q. Hoyt, vice-president, and Andrew McKinney, treasurer of the New York, Boston and Montreal Company. William Foster, Jr., was president, John Q. Hoyt, vice-president, and Andrew McKinney, treasurer of the defendant. The defendant needed money to carry on its work, and applied, through its president, Mr. Foster, to the officers of the New York, Boston and Montreal Company above named, for a loan of about \$10,000, as it should be required from time to time. These officers refused to loan the money individually, but said that they would consider whether the New York, Boston and Montreal Company might not loan it. The two roads, when completed, were to operate together, hence it was regarded for the interest of the New York, Boston and Montreal Company to aid the defendant and make the desired loan. Mr. McKinney laid the application before Mr. Brown and Mr. Hoyt. They authorized him to advance the money to the defendant. Accordingly the New York, Boston and Montreal Company, through Mr. McKinney, treasurer, paid out for and advanced to the defendant moneys, in divers sums at various times amounting to \$10,816.77.

The New York, Boston and Montreal Railway Company had a claim against the defendant for the amounts above stated. This claim was unpaid on September 30, 1874. At that time it was charged on the books of the company against Mr. McKinney. Mr. Cassell, an agent of Messrs. Bischoffsheim & Goldsmith, of London, who were stockholders of the New York, Boston and Montreal Railway Company, examined the books of the company in the summer of 1874, and expressed some dissatisfaction with the loan to the defendant, whereupon Mr. McKinney proposed to assume it himself. Mr. Brown advised him to do it; whereupon the claim against the defendant was

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charged against Mr. McKinney's account, the company owing to him a sum exceeding this amount for services as treasurer and for money loaned. The transfer was made on the books by order of Mr. Hoyt, vice-president. At the time of the transfer, the defendant had refused payment of the said loans; was unable to pay them; had abandoned its enterprise, and was without means or credit; and said claim against it was, at that time, apparently of no pecuniary value. The object and purpose of all the parties to the said transfer were to carry out thereby the proposal which McKinney had made to the agent of Bischoffsheim & Goldsmith, to assume to himself the said claims against the defendant, and to have the same charged to his account, and that said McKinney should thereby pay to the New York, Boston and Montreal Railway Company the loans made to the defendant. Mr. McKinney would not have bought this claim, and paid cash for it. He took the claim as an assignment on account of his debt. Upon examination he said:

Q. And that the assignment was made to you in payment of that indebtedness, or part payment?

A. Yes, sir.

Q. And that you accepted it as such?

A. Yes, sir.

Prior to September 30, 1874, the New York, Boston and Montreal Railway Company had neglected to pay some of the coupons upon its bonds, also some notes which had gone to protest. Judgments were recovered against it, which were not paid. The judgment which formed the basis for the appointment of a receiver had been obtained and remained unsatisfied. These obligations were not paid, on account of the want of funds to pay them.

Mr. Brown, Mr. Hoyt and Mr. McKinney said, when the loan was made, that they would return the money to the company if the defendant did not pay it.

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There seems to have been no disapproval of the loan by the company. No disapproval of the loan was expressed by any one except Mr. Cassell, who was not an officer in the company.

The claim which Mr. McKinney had, if he had any, against the defendant, was assigned to the plaintiff.

The defendant's counsel moved at the close of the testimony for a dismissal of the complaint :

1. On the ground that the plaintiff had not proved the cause of action stated in the complaint.

2. On the ground that no cause of action was shown against the defendant.

The motion was granted, the referee delivering the following opinion :

JACOB F. MILLER, Referee.—The complaint alleges that the loan was made by the New York, Boston and Montreal Railroad Company to the defendant. This allegation is sustained by the proof. The moneys paid were the moneys of the New York, Boston and Montreal company. Their checks were delivered to the defendants, or to some other persons by their order. The moneys were loaned at the request of Wm. Foster, Jr., the president of the defendant. He said it was wanted to aid in engineering projects connected with the road to be built by the defendant. Whether it was so used in fact is unimportant. The lender, under such circumstances, is not responsible for a misappropriation of the funds.

The act of loaning money to the defendant to aid in a work auxiliary to its main business would not be prohibited. In *Brown v. Winnisummit Company*, 11 *Allen*, 334, the court said :

“ We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or trans-

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actions, not coming within the exact scope of those designated. Undoubtedly, the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts, and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient or profitable in the care and management of the property which it is authorized to hold under the act by which it was created."

But even if the New York, Boston and Montreal Railway Company had no authority to make the loan, still the defendant, having had the benefit of the contract of loan, cannot be permitted to avail itself of the defense that the New York, Boston and Montreal company had no authority, express or implied by the terms of its charter, to make the loan (4 *Johns. Ch.* 370 ; 6 *Hill*, 37 ; 5 *Id.* 139, 490, 491 ; 16 *Mass.* 102 ; 13 *Pa.* 13 ; 5 *Sandf.* 170 ; 11 *Barb.* 213 ; 17 *Id.* 378 ; 19 *Id.* 568 ; *Parish v. Wheeler*, 22 *N. Y.* 494 ; *Bissell v. Michigan S. & N. I. R. R. Co.*, *Id.* 269).

The act of the New York, Boston and Montreal company must be presumed valid until the contrary is shown. The dealings of a corporation which, on their face or according to their apparent import, are within its charter, are not to be regarded as illegal or unauthorized without some evidence to show that they are of such a character. In the absence of proof, there is no legal presumption that the law has been violated. On the contrary, these artificial bodies, like natural persons, are entitled to the benefit of the rule which imputes innocence rather than wrong to the conduct of men (*Chautauqua County Bank v. Risley*, 19 *N. Y.* 369 ; 2 *Cow.* 664 ; 24 *Barb.* 25 ; *Farmers' Loan and Trust Co. v. Clowes*, 3 *N. Y.* 470 ; *De Goff v. American Linen Thread Co.*, 21 *Id.* 124 ; 12 *Wheat.* 64).

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In the *Bank of the U. S. v. Dandridge*, 12 *Wheat.* 70, the supreme court said :

“It (the law) presumes that every man in his private and official character does his duty until the contrary is proved ; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption. . . The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office ; acts done by the corporation, which presuppose the existence of their acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted, and slight acts on their part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. . . In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each afford presumptions from acts done of what must have preceded them as matters of right, or matters of duty.”

In the same case, the court says :

“In reason and justice, there does not seem any solid ground why a corporation may not, in case of the omission of its officers to preserve a written record, give such proofs to support its rights as would be admissible in suits against it to support adverse rights.”

And in the *Farmers' Loan & Trust Co. v. Clowes* (3 *N. Y.* 470), it was held that where a loan by “such a corporation was contested by the borrower on the

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ground of a want of power to make it, it rested on him to show affirmatively that the loan was not made in the proper exercise of the powers expressly granted."

And in *Elwell v. Dodge* (33 *Barb.* 340), it was held that: "So long as the corporation, or any one claiming under it, or as a creditor having a claim against it at the time of the transfer who might be injured by it, do not repudiate the transaction, and seek to reclaim or reach the note, the debtor cannot attack the title of the holder under this statute. The transfer is not void, but simply voidable at the suit of the corporation or other party in interest." The statute referred to is 1 *R. S.* 4th ed. 1115, § 60.

The defendant, therefore, cannot take advantage of the point that the loan was unauthorized. The plaintiff has alleged that the loan was made by the New York, Boston and Montreal Railway company, and cannot introduce evidence to contradict it.

In *Elwell v. Dodge* (*supra*), it was decided that "it is to be presumed that acts which an officer of a corporation usually and continually performs in its behalf are authorized by its directors."

And in 18 *Ind.* 327, it was held that "a debtor cannot avoid payment of his obligations to a bank on the ground that the discounts were not made by a quorum of directors, as required by the charter. Such provisions are directory merely."

"A corporation is bound by the express or implied contracts of its agents or officers made in the ordinary discharge of their official duty, though not authorized or executed under its corporate seal" (7 *Cranch*, 299; 5 *Wheat.* 338; 8 *Id.* 338; 14 *Pet.* 19; 16 *How. Pr.* 524).

And as to the performance by the officers of an act which the corporation had no power to perform being the act of the corporation, and not a mere act of the officers, see 7 *Wend.* 31; 22 *N. Y.* 258; 33 *Cal.* 134.

I conclude that the acts of Messrs. Brown, Hoyt,

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and McKinney were valid acts, and the defendant became liable to the New York, Boston and Montreal company, and that Mr. McKinney was not so liable. I could not conclude, without evidence to show it, that Mr. McKinney had embezzled the funds of the company. As no proceedings were taken against him to recover the money, it is reasonable to presume that the company whose money was taken did not think so.

On September 30, 1874, when the claim against the defendants was charged against McKinney, the company had ceased to pay its obligations. It could not make an assignment of any of its property or choses in action to him, directly or indirectly, for the payment of any debt, he being the treasurer of the company.

“Whenever any incorporated company shall have refused the payment of any of its notes or other evidences of debt, in specie, or lawful money of the United States, it shall not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company, to any officer or stockholder of such company, directly or indirectly, for the payment of any debt . . . and every such transfer and assignment to such officer, stockholder or other person, or in trust for them or their benefit, shall be utterly void,” &c. (1 R. S. 603, § 4).

In *Harris v. Thompson* (15 Barb. 62), the supreme court said :

“Two classes of transfers or assignments by corporations are prohibited by this section upon its most obvious reading. By the first clause, assignments and transfers to stockholders or directors, directly or indirectly, for the payment of any debt, after the corporation shall have refused payment of its notes or evidences of debt, are forbidden, whether the company is solvent or insolvent. The object of this provision is evidently to prevent an undue preference of directors

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and stockholders in the payment of their debts over the creditors at large, without putting the latter to the proof of actual or contemplated insolvency, and making the refusal to pay debts of a specified character sufficient to defeat such assignment" (See also 30 *Barb.* 645).

And in *Diven v. Phelps* (34 *Barb.* 229), the supreme court, at general term, says :

"The statute expressly provides that every person receiving, by means of assignment or payment, any of the effects of such corporation" (an insolvent corporation) "shall be bound to account therefor to its creditors or stockholders or their trustees."

And in *Brouwer v. Harbeck* (9 *N. Y.* 594), the court of appeals said :

"A corporation, like an individual, is insolvent when it is not able to pay its debts. Insolvency means a general inability to answer, in the course of business, the liabilities existing and capable of being enforced" (See also 21 *N. Y.* 406 ; 35 *Id.* 96).

I conclude that the assignment to Mr. McKinney, being made in consideration of the debt due him for services and loans, was void ; that if he had received the money from the defendant upon the claim, he would be compelled to account for it to the company. or, after his appointment, to the receiver.

As it was necessary to show a valid assignment of the company's claim to Mr. McKinney to enable the plaintiff to maintain his action, the motion to dismiss the complaint will have to be granted.

But it is urged by the plaintiff's counsel that Mr. McKinney had no authority to make the loan on behalf of the company, and that therefore he became personally liable to the company for a misappropriation of its funds. He, in turn, had an action against the defendant for the money loaned. This claim he could assign to the plaintiff. Charging the debt to himself on the books of the company, which owed him a larger amount,

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was paying the company, and he therefore became subrogated to the right of the company to the claim in question. While I cannot assume, in the absence of proof, that Mr. McKinney embezzled or misappropriated the funds of the New York, Boston and Montreal Railroad Company, suppose it be admitted. Does the conclusion follow that Mr. McKinney had a claim that he could assign? It will not be disputed that the New York, Boston and Montreal Railroad Company had a claim for the moneys, because they had a right to follow their property into whosoever's hands it might come. If the agent misappropriates the funds of his principal, he too may have an action against the receiver of the principal's money, but not for himself. He brings the action to recover on behalf of his principal, for whom he is trustee. He has, therefore, no claim of his own; he has a claim for the benefit of his principal, who can appropriate it or the proceeds of it. If Mr. McKinney had brought an action against the defendant and sustained it on the ground of his misappropriation of the funds of the New York, Boston and Montreal Railroad Company, he would have done so for their benefit and as trustee for them. What right had he to assign the claim to any other person?

In *Story on Agency*, section 398, it is said that "an agent selling goods under a *del credere* commission, is entitled to sue for the price of the goods sold by him. Indeed, as between himself and the vendee, he is generally treated as the owner of the goods, and, of course, he is entitled to the general rights of an owner; but still he is so subject to the superior rights of principal, not incompatible with his own."

Again: "So if an agent has transferred the money or property of his principal, under circumstances which gave him a right to recover it back, he may do so in his own name, notwithstanding his principal may maintain a like suit therefor; the agent (as was said by Lord

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MANSFIELD) may maintain the suit from the authority of the principal, and the principal may maintain it as proving it paid by the agent" (Same section).

"But perhaps, strictly speaking, the agent acquires such right because of his responsibility for the money or property to his principal and the interest which he has in indemnifying himself." Yes, if he pays it (*Ib.*).

In *Holt v. Ely*, 1 *Ellis & Blackburn*, 795, it was held that where L. placed in plaintiff's hands a fund out of which plaintiff was directed to satisfy certain acceptances, defendant falsely represented to plaintiff that he held one such acceptance, and thereby induced plaintiff to pay him the amount of the alleged acceptance out of the fund. *Held*, that plaintiff might maintain an action for money had and received against defendant. Also held that L. might have maintained the action.

In *Stevenson v. Mortimer*, *Cowper*, 806, Lord MANSFIELD said :

"Where a man pays money by his agent which ought not to have been paid, either the agent or principal may bring an action to recover it back. The agent may from the authority of the principal, and the principal may as proving it to have been paid by his agent."

Now, it is obvious that though an action might be maintained by both principal and agent, there is but one claim : the principal has this. The agent's claim is for the benefit of his principal.

In *Taylor v. Plumer*, 3 *Maule & Selwyn*, 565 the defendant, Plumer, delivered moneys to one Walsh, a broker, to purchase exchequer bills ; but he (Walsh), instead of obeying instructions, used the money to buy American securities, intending to abscond with them ; while absconding, he was overtaken by defendant's attorney and a police officer. He gave up the securities to the attorney of defendant. Walsh

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then went into bankruptcy. His assignee brought suit to recover the value of the securities. *Held*, that he could not maintain the action. *Held*, also, that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money. Lord ELLENBOROUGH said :

“The plaintiff [assignee of the agent] in this case is not entitled to recover if the defendant has succeeded in maintaining these propositions in point of law, viz: that the property of a principal entrusted by him to his factor for any special purpose belongs to the principal, notwithstanding any change which that property may have undergone in point of form, so long as such property is capable of being identified and distinguished from all other property. And secondly, that all property thus circumstanced is equally recoverable from the assignees of the factor, in the event of his becoming a bankrupt, as it was from the factor himself before his bankruptcy. And, indeed, upon a view of the authorities and consideration of the argument, it should seem that if the property in its original state and form was covered with a trust in favor of the principal, no change of that state and form can divest it of such trust, or give the factor, or those who represent him in right, any other more valid claim in respect to it than they respectively had before such change. An abuse of trust can confer no rights on the party abusing it, nor on those who claim privity with him. The argument which has been advanced in favor of the plaintiffs,—that the property of the principal continues only so long as the authority of the principal is pursued in respect to the order and disposition of it, and that it ceases when the property is tortiously converted into another form for the uses of the factor himself,—is mischievous in practice, and supported by no authority of law.”

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In *Birdenbecker v. Lowell*, 32 *Barb.* 18, the supreme court said, speaking of the act of a cashier of a bank :

“The bank was advised of what had been done, and, within a very few days and as early as October, 1856, received a part of the fruits of the arrangement, and has never repudiated the transaction or reclaimed the notes. If it did not intend to abide by the acts of Etheridge in the premises, it should have dissented and given notice within a reasonable time ; and not having done so, an assent to or ratification of the acts will be presumed. When the principals received a letter from their agent in July, informing them of what he had done, and they were silent until October, and then for the first time complained, they were considered to have waived any right of action they might have had (*Cairnes v. Bleecker*, 12 *Johns.* 300 ; 2 *Kent Com.* 316 ; *Benedict v. Smith*, 10 *Paige*, 127). It follows that the bank must abide by the acts of Etheridge in accepting the transfer of property and surrendering the notes to Gates to be canceled. It is true that conveyances were to Etheridge directly and not to the bank ; but by the transfer a trust was created for the payment of a debt due to the bank, and the fund provided belonged to the bank and might be controlled by it ; first, as having been taken by the agent in his own name, the agent in such case taking as trustee and not in his own right.”

This case is important as showing that the New York, Boston and Montreal Company must be presumed to have ratified Mr. McKinney's act, if unlawful, and secondly, as showing that the right of action against the defendant, if he had any, for misappropriated funds was still as trustee for the New York, Boston and Montreal company, until they chose to assign it to him.

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In *Wolfe v. Brouwer*, 5 *Robt.* 603, where an agent had misappropriated certain drafts, the court said :

“Of course, whatever such agent received on the misapplication of such drafts he received from the plaintiffs, and as their agents in a fiduciary capacity, and was bound to transfer them, and for not delivering it over might be held to bail.”

If, therefore, McKinney had a right of action against the defendant for moneys which he had misappropriated as their treasurer, he had such right in entire subordination to the rights of the New York, Boston and Montreal company, and as their trustee. He could not assign the claim to anybody else, without their authority.

But it is urged that Mr. McKinney became subrogated to the rights of the New York, Boston and Montreal company, and had, therefore, a right to sue or assign. He could become subrogated to their rights only by paying them. He did not pay them. He did not part with a dollar. He could not pay the company with his services, except by receiving the payment of his own debt, which the statute prohibits. Had he bought the claim and paid cash for it, the assignment would have been valid, for the company is not prohibited from selling its claims, even it had stopped payment. But by charging the claim against the debt to Mr. McKinney, it tried to deprive itself of some of its assets, and received nothing in return except a cancellation of its debt, which it was by law prohibited from paying directly or indirectly (See *Story Eq. Jur.* §§ 494, 499, 499 d, 500, 501 ; *Lewis v. Palmer*, 28 *N. Y.* 271).

In this latter case, the court of appeals said :

“The case, therefore, was that of a surety who pays a debt for his principal, and who was entitled to be subrogated to the rights of the creditor against the principal debtor. It is a well-settled principle that a

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surety who pays a debt for his principal is entitled to be put in the place of the creditor, and to all the means which the creditor possessed to enforce payment against the principal debtor (*Clason v. Morris*, 10 *Johns.* 534; *Wilkes v. Harper*, 2 *Barb. Ch.* 338; *Mathews v. Aiken*, 1 *Comst.* 595; *Hodgson v. Shaw*, 3 *Mylne & K.* 183)." In *Hayes v. Ward* (4 *Johns. Ch.* 130), Chancellor KENT said: "The doctrine does not belong merely to the civil law system. It is equally a well settled principle in English chancery that a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and to stand in the place of the creditor, and have his securities transferred to him, and to avail himself of those securities against the debtor."

Had Mr. McKinney paid for the claim, he might have enforced it. If the company had been solvent, or had not refused to pay its obligations, the cancellation of his indebtedness for services might have been a good consideration for the transfer. But after the company refused to pay its obligations, it was prohibited from making any transfer to its officers in payment of any debt. If the cancellation of Mr. McKinney's indebtedness be a payment, then the company after payment had \$10,000 and upwards less to give to its creditors. A payment to a company which abstracts its funds can scarcely be considered a payment.

It is also urged that in a suit by the company against Mr. McKinney for misappropriating its funds, he could set off his services; and I am referred to 4 *Barb.* 389, and 8 *Cow.* 392, 394. These cases arose under an entirely different statute. In 1 *R. L.* 247, it is declared that in the event of a dissolution the stockholders at the time "shall be liable to the extent of their respective shares of stock held in such company, and no further." And in *Tallmadge v. Fishkill Iron*

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Co. (4 *Barb.* 388), directors were held liable in a sum equal to the amount of their stock. The statute declares that when debts exceeding three times the amount of the capital stock shall have been contracted, the directors shall be liable to a sum equal to the amount of their stock to make it up. The amount of the excess becomes at once a debt due from the directors, who are declared to be liable to the corporation.

Also held that the directors sued might have set off any sum which they had already advanced on account of the company.

Same effect, *Biggs v. Peniman* (8 *Cow.* 392). These were cases arising under special statutes defining the limits of a stockholder's or director's liability. When he has paid that amount he ought to pay no more. These statutes apply to those officers or persons and do not change the general law relating to counter-claims.

As I have reached the conclusion that the making of the loan was not an illegal act, this question of set-off is unimportant. The company had no claim against Mr. McKinney, and hence there was nothing to set off against Mr. McKinney's claim if he brought the action, or against the company's claim if it brought the action. But if the contention of plaintiff's counsel be true that Mr. McKinney misappropriated the funds of the company and thereby became liable to damages therefor, would the right of set-off or counter-claim exist? If plaintiff's counsel be correct, Mr. McKinney converted the funds of the New York, Boston and Montreal Railway Company, for which he might be arrested. The action against him would be found in tort. Could he counter-claim or set off his demand for services? Section 150 of the code determines the cases in which counter-claims may be allowed, as follows:

“1. A cause of action arising out of the contract or

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transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action.

"2. In an action arising on a contract, any other cause of action arising also on contract and existing at the commencement of the action."

In *Pattison v. Richards* (22 *Barb.* 145), the action was brought to recover damages against the defendant for diverting waters of a stream to his injury, the defendant sought to counter-claim on an agreement between the plaintiff and himself by which, for the purpose of draining a marsh on the lands of both plaintiff and defendant, each was to dig ditches at certain specified places. Defendant alleged that plaintiff had not performed his contract. Held, that such a claim could not be allowed, "it having no connection with the tortious act of the defendant of which the plaintiff complains. No principle of equity will justify the court in receiving it, either as a full or a partial defense to the plaintiff's cause of action. If the agreement is a valid agreement under the statute of frauds, and the plaintiff has violated his part of it, and the defendant has a remedy against him for such violation, he must seek that remedy in a separate suit. It cannot be accorded to him in this action" (See also *Edgerton v. Page*, 20 *N. Y.* 285; *Piser v. Stearns*, 1 *Hill.* 86; *Chambers v. Lewis*, 2 *Id.* 595).

It is true that the New York, Boston and Montreal Railroad Company might waive the tort and sue in contract; but till it chose to waive its rights and in some way manifested it, the presumption should be indulged that they reserved all their rights. The company did not manifest its willingness to transfer its claim until it was too late to avail Mr. McKinney. Mr. Cheever, his assignee, takes the claim subject to all the defenses against it in the hands of Mr. McKinney.

The complaint must be dismissed.

Appellant's points.

North, Ward & Wagstaff, attorneys, and *Thomas M. North*, of counsel, for appellant, in substance urged:—I. This case does not fall within the statute. (a.) The effect of the transaction was not a transfer of the company's property for the payment of a debt due to McKinney. It was a mere offset of debts. 1. McKinney, if not legally, was morally bound for the indebtedness of defendant. His assumption of that indebtedness was in pursuance of the duty which morally rested on him. 2. The loan to the defendant was made without proper authority of the company whose money was loaned. This made the treasurer McKinney liable for any loss arising therefrom (*Robinson v. Smith*, 3 *Paige*, 231; *Story on Agency*, 217-223; *Angell & Ames on Corp.* § 312; *Austin v. Daniels*, 4 *Den.* 299; *Franklin Ins. Co. v. Jenkins*, 3 *Wend.* 133; *Butts v. Wood*, 37 *N. Y.* 317; *affi'g S. C.*, 38 *Barb.* 181; *Robinson v. Smith*, 3 *Paige*, 222; *Cunningham v. Pell*, 5 *Id.* 612; *Wood v. Draper*, 24 *Barb.* 187; *Gaffney v. Colville*, 6 *Hill*, 567). Brown and Hoyt being liable, would be no defense to McKinney. In an action against McKinney to enforce this liability, the amount due for advances and salary would have to be allowed. The amicable arrangement by which McKinney, upon complaint made by a heavy stockholder, placed the company in the same position as it would have occupied if he had driven the company to litigation, can only operate as an offset of mutual claims. (b.) The referee seems to have arrived at his conclusion, partly upon principles, which although correct in the abstract, have no application, and partly on propositions unsound in themselves. 1. He considered quite fully the question as to the authority of the company to make the loan, and as to the effect, both of want of authority in the company itself, and of want of authority from the company (itself having authority), to the officers to make loans, on the borrower, and from his de-

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cision that the company had authority, and even if it had not, the borrower could not dispute, and that, as between the company and the borrower, the acts of its officers were binding, concluded that the transfer in question was a payment on a debt. The principles thus decided, which led to this conclusion, have no application to the case. The question here is whether the officers of a company, as between themselves and the company, were authorized of their own motion, without by-laws, resolution of directors, or other express assent of the governing body. 2. The fact that no officer of the company disapproved of the loan also influenced him. Neither approval nor disapproval by any or all of the officers, could affect the case. McKinney would still be liable to the company, or any stockholder or creditor thereof (See cases cited above). 4. The referee's correct conclusion that defendant was liable to the company, seems to have led him to the conclusion that McKinney was not, and this seems to have affected the ultimate conclusion. This was erroneous. Both were liable. The company having obtained satisfaction from McKinney, he was subrogated to their right against defendant. 5. The referee held that McKinney would not be liable unless he had embezzled the company's money, and this affected the final result. This was erroneous. Officers are liable for loans and defalcations "occasioned by their neglect, as well as by their positive misconduct" (Cases above cited). 6. The referee held that if the company had a claim against McKinney, it could not be subject to set-off or counter-claim, being in tort, unless the company manifested its intention to treat it as a contract debt, by suit. This also was error (See above cases). The various errors led to the erroneous conclusion that the case fell within the statute. (c.) The assignment by the company, and the entry on the books, were simply means of consummating the amicable agreement for an

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offset, and also to perfect in law what equity had already done, viz: subrogation; and therefore does not fall within the purview of the act. (*d.*) Where an agent pays money or transfers property of his principal under circumstances which give him a right to recover it back, he may do so in his own name notwithstanding his principal may maintain a like suit therefor (*Stevens v. Mortimer, Cowper*, 806; *Story on Agency*, § 398). The referee, admitting this general proposition, holds that it does not control this case, and arrives at that conclusion upon two propositions, both of which are erroneous as applied to this case. 1. He says the action in such case is not for the agent, but for the principal, who can appropriate its proceeds. True, if the agent has not paid or indemnified the principal; but if he has done either, then the control and proceeds of the suit will be the agent's own. Here he has paid his principal by the offsetting above mentioned. 2. He also says that if McKinney had received the money on this claim from the defendant, he would be compelled to account for it to the company. On said accounting, however, he would have to be allowed, as an offset, his salary and advances, which would leave the parties in precisely the position in which this amicable arrangement of offset has placed them. (*a.*) If the complaint did not sufficiently allege a cause of action arising out of this right of McKinney's, the pleadings should have been conformed to the facts proved.

Porter, Lowrey, Soren & Stone, attorneys, and *Burton N. Harrison*, attorney and of counsel, for respondent, among other things, urged:—I. The claim, as stated in the complaint, the testimony of plaintiff's witnesses, and the facts as found by the referee, brought the case squarely within the prohibition of 1 *Rev. Stats.* 603, § 4; *Rev. Stats.* part 1, chap. XVIII.,

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tit. 4, § 4. There was no alternative ; the complaint was necessarily dismissed. But to escape, if possible, the plaintiff's counsel argued before the referee these two points : 1st. That the transaction of September 30, 1874, was not an assignment to McKinney, but was something else ; and, 2nd. That, if an assignment it was not an assignment for the payment of a debt, but was an offset of two debts. It is difficult to perceive any substantial distinction made in the facts, by this jugglery of words—or how the plaintiff's case is improved, if the names counsel tries to give to things are allowed. But, 1st. If there was not shown to have been an assignment from the New York, Boston & Montreal Railway Company to McKinney, then the cause of action alleged in the complaint was not proved, and the complaint was properly dismissed. The complaint alleges nothing else but an indebtedness from the defendant to the New York, Boston and Montreal Railway Company, and that it “has been duly assigned to and is now vested in the plaintiff”—that is the whole cause of action set up. The fact, however, is that the transaction was an assignment and transfer from the company to McKinney—in the sense in which those words are commonly used, and in the sense in which they are used in the statute. (a.) The complaint alleges an assignment. (b.) The two instruments of assignment and transfer are in evidence, one of which is, and professes to be, a formal assignment, while the other is a formal order to the book-keeper to transfer the account on it set forth to McKinney and to charge McKinney's account with the amount of it. (c.) McKinney's evidence is that each of those papers was an “assignment,” and that the book-keeper obeyed the directions given, by actually transferring the accounts and charging McKinney with them. He says: “I accepted these assignments, and my account was charged with them accordingly. I regarded it as an assignment

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—not a purchase. I would not have been willing to buy it and pay cash for it.” (d.) The instrument of assignment made by McKinney to Cheever, speaks of the subject matter it related to as “the indebtedness of the Gilbert Elevated Railway Company . . . which was assigned to me by the New York, Boston and Montreal Railway Company by assignment dated September 30, 1874, amounting at the date of said assignment to the principal sum of, &c.” And all the facts show, and Mr. McKinney, the witness, in terms explicitly states more than once, that the assignment was for the payment of the then indebtedness of the New York, Boston and Montreal Railway Company to him. (a.) He testified: “Q. In your direct examination, I understood you to state that . . . the New York, Boston and Montreal Railway Company was indebted to you? A. Yes, sir. Q. In an amount in excess of the amount of the assignment? A. Yes, sir. Q. And that the assignment was made to you in payment of that indebtedness, or part payment? A. Yes, sir. Q. And that you accepted it as such? A. Yes, sir.” (b.) And, after there had been discussion in the presence of the witness as to the effect of that testimony upon the very point now under discussion, and when the witness was fully aware of the tendency of what he was saying, and after he had heard the statute (1 R. S. 603, § 4) read, and after he had been talked to on the subject—after all that, he again testified, in reply to a question by the referee, as follows: “Q. I understand that the company was owing you, and you took this on account? A. Yes, sir; as far as it went.” Language cannot be more explicit than that, and there is no possible room for doubt or hesitation in finding as the referee did upon the explicit and uncontradicted statement of the witness, that the assignment was “for the payment of a debt.” (c.) How could it be for anything else? By

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"taking the debt" he certainly doesn't mean to say that he took it without giving some sort of consideration for it. He had no right to do that. The moneys of the company had been advanced and he undertook to make them up—to make the company good for the amounts. The only way he could do it was first, either actually to repay the moneys into the treasury of the company as in purchase of the assignment, or second, to attempt to make up the amount to the company—to reimburse the company by crediting the company with the amounts, on his own account against the company on which a larger sum was due him by the company. He didn't do the first and he did do the last. If he had stopped there—if he had merely reimbursed the company by crediting the company with the amount in his own account against the company, and had left the company's claim against this defendant outstanding to be enforced whenever convenient, he might have been all right—the company could have collected the amounts from the defendant, and McKinney might then have been entitled to receive the collections as having been made for his benefit. But he didn't stop there. To make himself good for the credits he gave to the New York, Boston and Montreal Railway Company, he got from it assignments and transfers to himself, of that company's claim against this defendant. And that latter is the very thing which, under those circumstances, is expressly prohibited by the statute (1 R. S. 603, § 4).

II. Counsel for plaintiff next argued before the referee that the assignment to McKinney was not for the payment of an equal amount of indebtedness of the company to him, but that it was for an offset of one debt against the other; and he got the witness to say that one charge merely "extinguished" the other. But that is only another way of stating the same thing. The two claims—that of the New York, Boston and

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Montreal Railway Company against the Gilbert Elevated Railway Company, and that of McKinney against the New York, Boston and Montreal Railway Company—were choses in action. The only way in which one chose in action can possibly be used for the payment of another, is by making them offset and extinguish each other; and, when one chose in action is used for an offset of another, or to extinguish it, what happens is simply this, that the one is used for the payment of the other.

III. Plaintiff contended in effect that the advances from the company's treasury were wrongfully made by McKinney, and so were not advances by the company at all, but by McKinney himself, which McKinney could have sued for and recovered in his own name; and that it is that claim of McKinney which is prosecuted here, and not the claim of the New York, Boston and Montreal Railway Company. For the defendant it was replied: 1. That new claim is not proved, the assignment to Cheever (which is in evidence) being an assignment, not of any original claim of McKinney against defendants, but an assignment of a claim of the New York, Boston and Montreal Railway Company against defendants, which the exhibit itself states to have been assigned by that company to McKinney September 30, 1874; and that is the transaction alleged in the complaint, and denied in the answer, and to which all the testimony was directed. 2. If McKinney has assigned to Cheever any other claim which was originally his own claim against the defendants, it must be prosecuted in a separate action and will be met by other defenses. Counsel then moved that the complaint be conformed to the facts as proved. That motion was opposed on the grounds that: 1. The referee had no power to grant the motion on any facts proved in this case. For if the complaint were so amended on the trial as to allege a cause of action not depending on any

Respondent's points.

assignment from the New York, Boston and Montreal Railway Company (which is the only thing alleged in the complaint and denied in the answer), it would "change substantially" both the claim and defense, and so would be in direct conflict with the provisions of section 173 of the old code, then in force—new code, section 723. 2. The denials of the answer were so explicitly directed to the single claim of the complaint that plaintiff was given his opportunity to amend the complaint under the provisions of the old code, section 172; and not having done so, it was too late to attempt on the trial any such amendment as could help plaintiff in the face of the facts proved by his own witness. Upon that objection the referee excluded the evidence; and, upon the whole case, the exception then taken by plaintiff is unavailing. The court had and has no power to amend the complaint as requested, and the judgment should not be reversed because of the exclusion of that immaterial evidence, the sole object of which was to lay a foundation for the motion to amend. The new allegation is not "material to the case," and it "changes substantially the claims" and "the defense," on which issue was joined (*Old Code*, § 173; *New Code*, § 723). In so ruling, the referee was right.

IV. As to the suggestion that McKinney had no authority from the board of directors, and so must be charged with the advances as having been made by him individually and not by or for the company, it was insisted before the referee by defendants that: 1. It is proved that this was only one of a great many such cases where advances were made by those officers without direction of the board of directors, and which the board had nothing to do with. It was the usual course of business of the directors to allow the president, vice-president and treasurer to manage the funds as they saw fit. 2. The three officers in question were the three chief officers of the company; and they

Respondent's points.

all united in authorizing the advances. 3rd. All the transactions were entered on the books of the company at the time (April and May, 1873), and were acquiesced in by the board of directors from that time to this—it being only in the summer of 1874, that even the agent of one of the stockholders raised any objection. And even his objection was not to the power or authority to make the advances, but to the wisdom or advisability of them. Nobody else has ever objected. 4th. On those facts, it cannot be objected by the plaintiff in this case that there was a want of authority in the officers who acted for the company in the matter. “The president, treasurer and secretary were the principal officers, and in their respective spheres, the agents of the company. The acts of these several officers . . . had never been disclaimed or questioned by the directors of the company. They had proceeded so long and to so great an extent that ignorance on the part of the company could not be asserted, and silence and acquiescence had ripened into indisputable authority. . . . We are convinced that the company could never have set aside this transaction on any pretense of want of authority in these their three principal officers. The facts we have stated would be perfectly conclusive against any such attempt on the part of the company. The implied authority, from the course of business and from similar acts done without challenge or disaffirmance, is as potent as an express resolution of the board of directors. . . . Proving a power implied from acts would be as effective as the most positive authority in writing” (*Lohman v. New York and Erie R. R. Co.*, 2 *Sandf.* 52). “A corporation may, like an individual, ratify the acts of its agents done in excess of their authority; and such ratification may, in many cases, be inferred from an informal acquiescence in and approval of those acts” (*Hoyt v. Thomson*, 19 *N. Y.* 218).

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The referee found that the act of the president, vice-president and treasurer, in making the advances, was the valid act of the company. He declined to find on the evidence that the treasurer was an embezzler of the company's moneys. The plaintiff's exception to that ruling cannot avail him here ; it affords no reason for reversing the judgement.

BY THE COURT.—FREEDMAN, J.—The facts found by the referee are fully sustained by the evidence, and upon them the merits of the case would be wholly with the plaintiff, if the statute (1 *Rev. Stat.* 603, § 4) did not apply. A careful examination of the reasons assigned, and authorities cited by the referee in support of the disposition he made of the case, has satisfied me, however, that he was correct in the construction which he placed upon the statute, and in the conclusions at which he thereupon arrived. Being unable to discover any error in the findings of fact or of law, or the refusals to find as requested, I am of the opinion that the judgment appealed from should be affirmed with costs.

CURTIS, Ch. J., and SEDGWICK, J., concurred.

WILLIAM A. HAVEMEYER, ET AL., ADMINISTRATORS, &C., PLAINTIFFS AND RESPONDENTS, v. JOHN C. HAVEMEYER AND HENRY HAVEMEYER, DEFENDANTS AND APPELLANTS.

STOCKHOLDERS OF CORPORATIONS.

THEIR RIGHT TO COMBINE TOGETHER FOR THE ELECTION OF DIRECTORS, AND FOR OTHER MEASURES AND ACTIONS CONNECTED

Statement of the Case.

WITH THEIR RESPECTIVE INTERESTS. VALIDITY OF AGREEMENTS OF THIS CHARACTER. DAMAGES FOR THE BREACH THEREOF.

An agreement between divers stockholders of a corporation, who together own a majority of all the shares of the capital stock of said corporation, entered into for the purpose of the election of directors, who would manage the affairs of the company in the interest of the stockholders, and thus improve the value of their stock, is not in conflict with the requirements of law, and in no wise derogates from its policy. There is nothing in it that tends to frustrate or interfere with the legal right of the majority of stockholders to delegate to directors of its own choice the management of the affairs of the company.

The following cases relating to this subject reviewed: *Fremont v. Stone*, 42 *Barb.* 170; *Guernsey v. Cook*, 120 *Mass.* 501; *Card v. Hope*, 2 *B. & C.* 661.

Nor is an agreement made between a like number of stockholders, in regard to holding their stock and selling the same together, invalid and in contravention of public policy and law.

The measure of damages for a breach of such an agreement as the latter, would be the amount of any depreciation in the fair cash market value of the stock occasioned by such breach. A charge by the judge that substantially withdrew from the jury any discretion as to the determination of that depreciation in their assessment of damages, held to be error.

APPEAL, WHEN ERRONEOUS ADMISSION OF EVIDENCE NOT GROUND FOR REVERSAL.

While the erroneous admission of irrelevant evidence ought not to be regarded as constituting sufficient ground for reversal, if it be clear that it was wholly innocuous and could not have affected the result (*Rowland v. Hegeman*, 59 *N. Y.* 643; *Downs v. N. Y. Central R. R. Co.*, 56 *Id.* 664), yet the legal intendment always is that such an error is prejudicial to the party objecting (*Coleman v. People*, 58 *N. Y.* 555). That intendment must be clearly repelled, and the error shown to be harmless, in order to justify its disregard by an appellate court.

The cases of *Anderson v. Rome, Watertown & Ogdensburg R. R. Co.* (54 *N. Y.* 334), and *Baird v. Gillet* (47 *Id.* 186), are conclusive against disregarding on appeal the erroneous admission of incompetent and illegal evidence, unless it is clear, beyond

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rational doubt, that the result was not and could not have been affected thereby.

Before SANFORD and FREEDMAN, JJ.

Decided March 11, 1878.

Appeal by defendants from a judgment entered on a verdict in favor of plaintiffs. Also from an order denying defendants' motion, made on the judge's minutes, for a new trial.

Henry A. Cram, for appellants.

John E. Parsons, for respondents.

BY THE COURT.—SANFORD, J.—It is strenuously insisted, on the part of the appellants, that the alleged agreement between the parties to this action, for the breach of which a recovery has been had, contravenes public policy, and is, therefore, illegal and void. A careful examination of the pleadings and proofs has failed to convince me that there was anything either in the combination and concert of action between the parties, which preceded the election of April, 1875, or in the agreement between them, which, in furtherance of the objects and purposes then had in view, is claimed by the plaintiffs to have been made in November following, that can justly be deemed obnoxious to criticism, as contravening the policy of the law. Divested of irrelevant matter not essential to the cause of action therein stated, the allegations of the complaint are to the effect, that during and prior to the month of April, 1875, the plaintiffs, as administrators of Albert Havemeyer, deceased, held and owned eleven thousand one hundred and ninety-six shares of the capital stock of the Long Island Railroad Company ; that the defend-

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ants, at the same time, assumed to own and control nine thousand seven hundred and seventy-six shares of such stock ; that in April, 1875, a board of directors was elected, of which the defendants were members ; that the defendant, Henry Havemeyer, was thereupon made president, and the defendant, John C. Havemeyer, a member of the executive committee of the board ; that the practical direction, management and control of the company and its affairs, were thus transferred to the defendants ; that such election and transfer were brought about under and in pursuance of a combination between plaintiffs and defendants, the object of which was to effect a sale of the stock held or controlled by both, and, in the mean time, until such sale, to secure the election of directors, who would manage the company's affairs in the interest of its stockholders, and thus improve the value of the stock ; that the defendants proposed to nominate all the members of the new board except two ; that by way of inducement to such combination, they disavowed any intention of selling their stock, and promised that no such action should be taken by them ; that upon defendants' assurances to this effect, and upon their promise of good faith in securing the objects proposed to be attained as above stated, it was agreed between the parties that their stock should be combined for that purpose ; that, prior to such election, negotiations were pending between the plaintiffs and one Poppenhusen, who owned or controlled competing and parallel lines of railway, for the sale to him of the stock held by both plaintiffs and defendants, together with such other stock as should seem suitable ; that in November, 1875, the plaintiffs secured definite proposals from Poppenhusen for a purchase ; that it was thereupon agreed by and between the parties, in furtherance of the agreement which had previously been made, that both parties should unite to effect a sale to Poppenhusen ;

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that neither should sell without the other; that the negotiations should be conducted by the plaintiffs, and that the defendants should aid by obtaining the union of other holders, so as to include all persons whom they stated they wished to join, and to combine such number of shares as Poppenhusen was willing to purchase; that the plaintiffs' negotiations for a sale were continued until December 18, 1875, when the defendants refused to join with them in any sale, but subsequently, and on or about January 26, 1876, did sell to Poppenhusen, including their own, and that of other persons, about thirty-five thousand shares of stock, at seventy-five per cent. of the par value thereof, leaving out the stock of the plaintiffs; that while thus professing to co-operate with the plaintiffs, and so preventing them from acting independently to effect a sale, the defendants arranged with other stockholders, with whom they had undertaken to communicate for the common benefit, so as individually to represent their stock; that they also bought stock of other parties, and thus secured the control of a majority of the stock, exclusive of the plaintiffs, and thereupon used their own stock, together with that thus acquired, to defeat a sale which should include the plaintiffs, and accomplish a sale which should include their purchased stock, leaving the plaintiffs out, and so causing to them the injury which it had been the object of the transactions and agreements between the parties, to avoid; that by such action on the part of the defendants, the plaintiffs' stock has been depreciated from seventy-five per cent. of its par value, to not more than forty per cent. thereof, and that for such depreciation, the defendants are liable; that of the stock held by plaintiffs, four thousand two hundred and forty-one shares belonged to themselves absolutely, and that the residue, with the knowledge of defendants, was, prior to the agreement made in November, distributed among the next

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of kin of Albert Havemeyer, for whom subsequently to such distribution the plaintiffs continued to act.

For the damage to themselves, as owners of such four thousand two hundred and forty one shares, the plaintiffs claim judgment.

The defendants by their respective answers to the complaint, put in issue most of the averments thereof, and, particularly, deny that there was any combination between the parties, prior to the election of directors in April, 1875, the object of which was to effect a sale of the stock for the common benefit of both parties, or for any other purpose than to secure the election of directors who would manage the company's affairs in the interest of the stockholders, and thus improve the value of the stock. For that purpose, the defendant, John C. Havemeyer, admits, in terms, that there was a combination and concert of action between the parties as alleged in the complaint. Both defendants admit by their answers that in November, 1875, it was agreed between plaintiffs and defendants, that, during a limited period, neither party should make, or agree to make, any sale of stock without the concurrence and participation of the other; but both defendants aver, that, before December 15, 1875, such agreement terminated and expired, and that the mutual obligations arising therefrom wholly ceased.

The sale by defendants to Poppenhusen of the stock held by themselves and other parties, exclusive of the plaintiffs, to the amount of thirty-five thousand shares or thereabouts, at the rate of seventy-five per cent. of the par value thereof, is not disputed by either defendant.

Upon the pleadings, therefore, the only material averments as to any agreement for a combination or concert of action between the parties, prior to the election in April, 1875, are to the effect, that, with a view to an ultimate sale, they agreed to combine their stock

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for the purpose of effecting a change in the administration of the company's affairs by securing the election of honest directors who would manage them in the interest of the stockholders, and thus increase the value of their stock ; that the defendants insisted, as a condition of such combination, that they should nominate all the directors to be elected except two, and assured the plaintiffs that they had no intention of selling and would not sell their stock. At the trial the only evidence on the part of the plaintiffs in support of these averments was that of Henry O. Havemeyer, who testified in substance, that it was arranged before the election, that the stock of the parties should be combined, and not sold until after the election, when there would be an opportunity of determining whether, and under what circumstances a sale should be made. The stock was to be united with the view of ousting the managers who then had control, and "so that a sale might be made, if we desired, at some future date." It was understood that the management should be placed in the hands of the defendants, but that the plaintiffs should be represented in the board by three directors of their own selection. He also testified that at the ensuing election in April, 1875, this arrangement was consummated. The former management was ousted and a new board was elected, as arranged.

I am unable to perceive anything in this combination, or in the agreement therefor, which tends to defeat the rights of stockholders generally, or the interests of the public at large, as defined by that provision of the revised statutes which declares that the directors of railroad corporations "shall be chosen annually by the majority of the votes of the stockholders voting at such elections." Practically, the selection of candidates must precede an election, and it would often be difficult, if not impossible, to make such selection without comparison of views, combina-

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tion, concession and concerted action. No formidable and effective opposition to an existing board, however obnoxious, could be organized without combination. An agreement to combine stock for the purpose of terminating mismanagement by a change in the direction through the instrumentality of a majority of votes, at a regular election, is not in conflict with the requirements of the law, and in no wise derogates from its policy. .

The well-established principles of law which have been invoked by the learned counsel for the defendants are not at variance with this view. They are intended to protect the public and the stockholders of corporations, from combinations whose object is to corrupt official action, and to preclude control by the majority in interest. They are applicable to cases in which one of the parties stipulates to accord or secure to the other, for a consideration, some private or personal advantage not shared by the stockholders at large. Nothing of that kind appears to have been contemplated by the combination now in question. Its object was to stop mismanagement by the election of an honest board, who would manage the corporation in the interest of its members and so as to improve the value of their stock. No other advantage was to accrue to any one concerned than such as would be common to all ; and, as the combination contemplated the sanction and approval of a majority of the stockholders voting at the election, there was nothing in it which directly or indirectly tended to frustrate or interfere with the legal right of such majority to delegate to directors of its own choosing the management of the company's affairs.

In *Fremont v. Stone* (42 *Barb.* 170), the defendants had stipulated with the plaintiff that on the payment by him of a certain sum as the price of sundry shares of stock then belonging to them, a change should be

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effected in the direction of the company of which they were members, at the dictation, and in the interest of the plaintiff and his co-purchaser, through the contrivance of the defendants, and not by the votes of the stockholders at large. The action was brought for a specific performance of the contract of sale, and it was held that such contract, by reason of its purpose, was contrary to public policy and void. So in *Guernsey v. Cook* (120 *Mass.* 501), where the conditions of a contract for the sale of stock were that the vendor should secure to the purchaser, the office of treasurer to the corporation, with a salary, and, in case of his removal from office, should repurchase the stock, it was held that the contract was void as against public policy, in the absence of evidence that the contract was not for the private benefit of the stockholder, or that it was consented to by the other members of the corporation. The case of *Card v. Hope* (2 *B. & C.* 661), involves substantially the same principle. It is the principle affirmed in the familiar maxim, "*Ex turpi contractu, non oritur actio.*" That maxim has no applicability to a contract or combination for united action, on the part of members of a corporation, whose object is to put an end to a dishonest or culpable management, and to replace it by one which will conduct the corporate business in the interest of all the stockholders, and particularly if such contract or combination contemplates, and can only have effect by virtue of, its ratification by the votes of a majority of stockholders at a regular annual election. The first combination or agreement alleged in the complaint appears to have been made for the purpose of effecting such a change. The change was to be effected by no contrivance or device on the part of either party, but simply through the ordinary and legitimate machinery of a regular election. No private or personal advantage was to inure to either of the contracting parties. They con-

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templated, indeed, an improvement in the value of their stock, and had in view, as an ulterior object, a possible sale on more advantageous terms when such improvement should have been attained. But every other stockholder would participate with them, in the realization of these anticipations, and their action in effecting the combination, or in voting pursuant to it, could therefore in no wise be vitiated thereby. I am of opinion, that the arrangement was contaminated by no illegality, and that, in so far as it formed the basis of the subsequent agreement alleged to have been made in November following, it imparted thereto no element of invalidity.

The agreement of November, 1875, is impugned, mainly, as connected with, and growing out of, the original combination already considered, and therefore as equally tainted with the illegality, which, it is said, affected that transaction. This objection is disposed of by the views already expressed. But it is further urged that the contract is inherently invalid, because made with the intent to transfer the Long Island railroad to a rival railway company, and thus to consolidate competing lines, and prevent competition. The mere fact that Poppenhusen was largely interested in competing lines, does not seem to me to constitute sufficient ground for avoiding a contract between stockholders of the Long Island Railroad Company, to unite their stock with that of other parties for the purpose of effecting its sale to him; even though the purpose and necessary effect of such sale should be to vest him with a majority of the stock, and hence with a controlling interest in the management of that company. There is no legal limitation upon the right of an individual to acquire any number of shares of stock in any number of corporations, whether their business be competitive or otherwise; nor is it to be presumed that one holding a controlling interest in more than one such

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corporation will so guide or control the affairs of either as to prejudice his associates therein, for the purpose of promoting his own advantage in connection with the others. Neither the pleadings nor the proofs in this case warrant the inference that the alleged contract between the parties to combine their stock for the purpose of effecting its sale to Poppenhusen, was entered into for the purpose, or with the intent, of enabling him to do an illegal act; nor can it be inferred that any illegal act was contemplated by him, from the mere fact that he desired to purchase such an amount of stock as would secure to him a controlling interest. The remedies properly applicable to breaches of official duty and trust, are amply sufficient for the protection of the public against merely possible, or even probable, violations thereof; and the policy of the law is not invaded by a contract, upon whose performance a wrong may be perpetrated, unless it be the purpose and intent of the parties concerned that such shall be its actual effect (*O'Brien v. Brietenbach*, 1 *Hill*. 304). No such illegal purpose or intent is established, nor can such be inferred from the evidence in this case. The judgment appealed from cannot therefore be impeached for error on the part of the court in refusing to dismiss the complaint, or to direct a verdict for the defendants on the ground that the compact between the parties, as alleged and proved, was void as in contravention of public policy and law.

I am further of opinion, that the contract between the parties involved no infraction of the requirements of law relating to the restraint of trade, and was not opposed to the policy of the law, as restricting the right of alienation. But I deem it unnecessary to discuss these points at length. The decision of the case must turn upon other questions involved, the correct solution of which is fatal to the maintenance of the judgment.

The measure of damages for a breach by the defend-

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ants of their contract not to sell their own stock except in connection with that of the plaintiffs, would be the amount of any depreciation in the fair cash market value of the plaintiffs' stock, occasioned by such breach. Such would seem to have been the understanding of the judge at the trial, but the rule of damage adopted by him, and stated in general terms to the jury in his charge, although substantially correct, and in accordance with this view, was afterward so modified by an assumption as to the value of the stock at the time of the breach, as substantially to withdraw from the jury any discretion as to the determination of that element in the assessment they were required to make.

The court charged that the plaintiffs claimed, among other things, as the result of the sale by defendants to Poppenhusen, a depreciation in the value of their stock from seventy-five cents on the dollar, which would have been obtained for it if defendants had kept their agreement, to thirty or forty cents on the dollar; and that if the jury found the facts to be as claimed by the plaintiffs, they were entitled to recover the difference between the value which the stock would have had if the defendants had kept their agreement, and the amount to which its value was reduced by the action of the defendants, with interest. "The claim made by the plaintiffs," he added, "is for the difference between four thousand two hundred and forty-one shares at seventy-five cents, amounting to \$159,037.50, and the same number of shares at forty cents, amounting to \$84,820; leaving a balance of \$74,217.50, with interest from January 26, 1876, to date, amounting to \$6,494.03, being a total of \$80,711.53, which the plaintiff's claim to recover." He then, in substance, directed the jury from the evidence in respect to the price paid by Poppenhusen on the sale to him by defendants, and the evidence of the witnesses as to the

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value of the stock after such sale, to determine the value of the stock at the time of the sale, and in view of the evidence and the instructions given them, to assess the damages which they considered the plaintiffs entitled to recover.

The fair purport and meaning of the learned judge, was that, in determining the value of the stock at the time of the breach by defendants, the jury were at liberty to consider the price paid by Poppenhusen as evidence tending to show its value at that time; the question of such value, however, as well as that of the value subsequently, being one for their consideration, and not, in any sense, one to be determined by the court. The charge, however, was not thus interpreted by the defendants' counsel, as appears from the form of their exception. They excepted to the conclusion "that the plaintiffs are entitled to recover the difference between seventy-five per cent. and thirty or thirty-five per cent."

As the charge of the court, as delivered, embodied no such conclusion, the exception would have been untenable but for what followed. In response to such exception, the court added: "The difference between seventy-five and such sum as the jury find to have been the value of the stock," thus correcting the error of the counsel in assuming that the court had fixed upon thirty or thirty-five cents, as the value of the stock after the sale, but adopting and confirming that error, with respect to its previous value, and thus leaving the jury to understand that they were not at liberty to ascertain or compute the depreciation upon any other basis than that of seventy-five cents on the dollar, as the value of the stock at the time when the sale was made. To this last proposition exception was duly taken, and as it may justly be inferred that the jury were misled thereby, I am of opinion that their verdict should not be upheld. While the evidence as to the price paid by Poppenhusen might have justified a

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for the jury, therefore, under all the circum-
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 ixed such value absolutely, at seventy-five cents
 the dollar, there was error for which the judgment

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should be reversed. That error was aggravated by the omission to confine the inquiry as to the amount of depreciation in the market value of the stock subsequently to the sale, to a reasonable period thereafter; but as this objection does not appear to have been specifically called to the attention of the judge at the trial, when exception was taken to his ruling in admitting evidence as to such market value, it should not be deemed entitled to weight in the determination of the present appeal.

Another exception to a ruling of the court in admitting evidence, to which objection was made on behalf of defendants, is of serious character. One Waterbury, a witness for the plaintiffs, was permitted to testify, under objection, that an interview occurred between himself and the defendant Henry Havemeyer, in which the latter proposed to him to make a combination of their stock, and "not to sell, one without the other." It is true that the objection was not made until after the witness had testified to the fact that such a proposal was made to him by one of the defendants. He had stated that one of them had an interview with him in the fore part of April, after the election, and the following question was thereupon put to him. Q. What was said between you, then? To this question, no objection was interposed, nor would an objection, if made, have been tenable. Any admission by either of the defendants, material to the controversy and bearing legitimately upon the issues to be tried, would have been admissible in evidence, and such an admission, if made, would have been elicited by the question. It could not be known, until the question was answered, whether or not the response would be relevant or material. The answer was immediately followed by the inquiry, "Which of the defendants proposed that?" The objection was then

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taken, that it was quite immaterial what bargain either defendant proposed to make with this witness. The objection was overruled; defendant's counsel excepted, and the witness answered, "Mr. Henry Havemeyer." I am of opinion that the objection was taken in time, and that the evidence should have been excluded. The evidence directly tending to connect Henry Havemeyer with the whole transaction was but slight, and the jury might naturally draw inferences adverse to both the defendants, and certainly to him, from the fact that he had been desirous of entering into engagements with others, similar in character to that, the existence or continuance of which, at a particular time, between the parties, constituted one of the most important issues to be tried. The evidence was *res inter alios acta*, and ought not to have been considered by the jury as bearing upon the issues submitted to them. Its admission, after objection, may well be supposed to have been regarded by them as involving an intimation from the court that it was competent and relevant, and might tend to establish the plaintiffs' case.

While the erroneous admission of irrelevant evidence ought not to be regarded as constituting sufficient ground for reversal, if it be clear that it was wholly innocuous and could not have affected the result (*Rowland v. Hegeman*, 59 N. Y. 643; *Downs v. N. Y. Central Railroad Co.*, 56 *Id.* 664), the legal intendment always is, as stated by ALLEN, J., in *Coleman v. The People* (59 N. Y. 555), that such an error is prejudicial to the party objecting. That intendment must be clearly repelled, and the error shown to be harmless, in order to justify its disregard by an appellate court. I am by no means satisfied that the jury were not influenced by this evidence, and that it did not in some degree prejudice the defendants. It is impossible to say that it did not tend to "awaken the

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sympathies, and warp and influence the judgments of the jurors to some degree." The cases of *Anderson v. Rome, Watertown & Ogdensburgh R. R. Co.* (54 *N. Y.* 334), and *Baird v. Gillet* (47 *N. Y.* 186), are conclusive against disregarding, on appeal, the erroneous admission of incompetent and illegal evidence, unless it is clear, beyond rational doubt, that the result was not, and could not have been, affected thereby. The admission of the evidence, notwithstanding the objection of the defendants, was tantamount to an instruction to the jury that they were authorized to consider it, in arriving at a conclusion as to the merits of the controversy, and the presumption is that they did. There is nothing in the case to repel that presumption, and the authorities are numerous for directing the reversal of judgments, where evidence far less objectionable has been erroneously received.

It is unnecessary, and perhaps undesirable, to pass upon other questions raised by this appeal.

My conclusion is, that the judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellants to abide the event.

FREEDMAN, J., concurred.

Statement of the Case.

AT SPECIAL TERM, OCTOBER, 1878.

IN THE MATTER OF THE APPLICATIONS OF AUGUST J. CHRISTERN, HEINRICH WEINBERGER, AND ARNOLD GEISEMAN, TO CORRECT THE RECORD OF PROCEEDINGS, ADMITTING THEM TO CITIZENSHIP OF THE UNITED STATES.

I. NATURALIZATION LAWS.

I. STATE COURTS.

(a.) *Character in which they act under such laws.*

1. *Quoad hoc* United States courts.

(b.) *Nature of their acts in admitting to citizenship.*

1. Judicial, and act of admission, constitutes a judgment.

(c.) *Record or roll of judgment, what sufficient to constitute.*

1. The preliminary proofs having thereon the initials of the presiding judge, on being filed in the clerk's office, with the oath of allegiance, constitute a record or roll of the judgment admitting to citizenship.

1. ENTRY IN A BOOK.—This is not necessary. But if it were, an entry made in alphabetical order, in a book entitled "Naturalizations" or "Naturalization Index," or "Naturalization Record," kept in the clerk's office as part of the records of the office, showing the date of the admission, the name of the applicant, his nationality, the name and residence of the witness, and if the admission was ordered without a previous declaration of intentions, either on a discharge from the army or on the ground that the applicant had arrived in this country during his minority, specially alluding to such fact, is sufficient. Such a book constitutes a special minute-book. It is not necessary an entry should be made in the general minute-book.

(d.) *Amendment of Record, power as to.*

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Has general power to amend, both at common law, and under the United States statute. In exercising the power they act as a United States court.

1. RECORD OF ADMISSION TO CITIZENSHIP, may therefore, if necessary, be amended by directing an entry in the minute-book of the fact of such admission *nunc pro tunc*.
2. ACT OF 1870 (U. S.) JULY 14, AGAINST USE, AND POSSESSION WITH INTENT TO USE, OF CERTIFICATES.

(a.) *Effect as to those issued prior to the act.*

1. APPLIES TO BUT FOUR CLASSES.

1. Certificates which are forged or counterfeit.
2. Certificates which though genuine in all respects, and issued pursuant to the direction of the court, were procured by or for the applicants therein named, by means of some imposition or fraud practised on the court.
3. Certificates issued by the clerk or other officers of the court, without lawful authority, in cases in which there was no appearance and hearing of the applicant in court.
4. Certificates issued to a person other than the one who uses or attempts to use it.

3. SUPERVISOR-IN-CHIEF OF ELECTIONS.

(R. S. U. S. §§ 2,002 to 2,081, 5,424 to 5,429.)

(a.) UNWARRANTED CLAIM OF.

1. A claim by him that a certificate of an admission to citizenship by this court, issued by the clerk thereof, and the admission itself, are invalid, *on the mere ground* that as the clerk of the court did not write out an entry in the general minute-book of the court reciting the proceedings, and showing the adjudication made, there is no legal record of the judgment of admission, *and that consequently the person to whom such certificate was issued would be subject to criminal prosecution if he should attempt to vote, is untenable and unwarranted.*

Decided at Special Term, October, 1878.

Motion to perfect records.

Algernon S. Sullivan, in support of the motion.

FREEDMAN, J.—The object of these applications is to have the record of the proceedings in this court, ad-

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mitting the applicants to citizenship of the United States, perfected by an entry, *nunc pro tunc*, of the fact of such admission in the minute-book of the court. Each of the applicants applies separately in his own behalf, and shows, under oath, among other things, the following facts:—That on full preliminary requirements with the statutes of the United States, he duly applied in open court to be admitted a citizen of the United States: that he took the requisite oaths and supported his application by the necessary and to the court satisfactory proof; that the court gave judgment to admit to citizenship, and that the officiating judge signified his “fiat” to that effect to the clerk of the court, to the applicant and to all whom it might concern, by superscribing the initials of his name upon the written and oath-attested proofs in the case, and delivered the same to the clerk to do thereupon and therewith all that the law required; that the clerk then and there, in pursuance of such judgment and fiat duly administered, and the applicant duly took and subscribed, the oath commonly called the oath of allegiance; and that thereupon the clerk issued to the applicant, under the seal of the court, a certificate as evidence of the fact of the adjudication made: that the clerk then indorsed and filed the papers and fiat among the court records, as a part thereof, and entered the name of the applicant and other facts connected with the application in a book of index of naturalization records, which is one of several books of like character, regularly kept and permanently preserved, among the records of said clerk’s office; that the applicant has always believed, and been advised, that the proceedings and judgment above recited duly admitted him to citizenship of the United States, but that recently the supervisor-in-chief of elections in this district, claiming to act under the acts of congress relative to the supervision of elections (*Rev. St. of the U.*

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S. §§ 2,002 to 2,031), and the punishment of crimes against the naturalization laws (§§ 5,424 to 5,429), has denied the validity of such admission and threatened to subject the applicant to criminal prosecution if he should attempt to vote at the next election, and that the only ground of such denial and threat is that there is no legal record of the judgment admitting to citizenship, for the reason that the clerk did not write out an entry in the minute-book of the court reciting the proceeding and showing the adjudication made. The facts so far referred to are common to the three applications. They differ only in the following particulars:—August J. Christern was admitted on September 15, 1868, at a term of this court held by Judge JONES, and Heinrich Weinberger on October 9, 1868, at a term held by Judge GARVIN. Their respective applications were made and granted in accordance with section 21 of an act passed at the second session of the thirty-seventh congress, entitled “An Act to define the pay and emoluments for certain officers of the army and for other purposes.” Arnold Geisemann was also admitted during the October term of 1868, but his application was founded upon his prior declaration of intention to become a citizen, which he had made and filed in this court on June 6, 1853. As an additional fact Heinrich Weinberger shows that the said supervisor of elections retains in his possession the certificate of citizenship issued to Weinberger by this court.

The questions arising from the motions before me are of such great importance that I should have been glad to hear the district-attorney of the United States for the southern district of New York, or the supervisor-in-chief, in opposition. I am assured that they were both courteously requested to appear and present their views, but that they declined on the ground that they could not do so consistently with their obligations. I exceedingly regret that they arrived at

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this conclusion, because in the decision of the questions involved, no conflict can arise between State and federal jurisdiction. True, in providing for a uniform rule of naturalization pursuant to the constitution of the United States, congress adopted among others the courts of record of the several States having common law jurisdiction and a seal and a clerk, as agents to exercise the power to admit aliens to citizenship. But in exercising this power, the said courts act exclusively under the laws of the United States, and hence are to be deemed *quoad hoc* courts of the United States. The concurrence of the legislatures of the State, expressed or fairly implied, merely adds the sanction of the State to this delegation of power (Ramsden's case, 13 *How. Pr.* 429; *People v. Sweetman*, 3 *Park. Cr.* 358). In the absence, therefore, of the benefit which I might have derived from an argument in opposition, I felt it to be my duty to thoroughly examine for myself the grounds of the several motions and all questions arising thereon. In this I have been greatly assisted by the timely suggestions and extensive researches of the learned counsel who appeared in support of the motions.

The power of the motions being, in substance, that a certain defect which is assumed to exist be cured by amendment of the record *nunc pro tunc*, the first question that presents itself relates to the power of the court to entertain the application.

Section 5,328 of the Revised Statutes of the United States expressly provides that nothing contained in the title, of which sections 5,424 to 5,429, relating to the punishment of crimes against the naturalization laws form a part, shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof. Under the statutes of the State of New York, this court possesses ample power to entertain a similar motion in any action or proceeding which arose under the laws of the State. But as, in matters of

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naturalization, the court acts exclusively under the laws of the United States, it may be doubted whether powers conferred by the statute law of the State can be invoked. On the other hand, no restriction upon the power to amend can be found in any act of Congress. From this it follows that the power exists, if it exists at common law, and that it may be exercised by every court which is at liberty to exercise it under the common law. This court belongs to that class of courts, and the existence at common law of the power to amend has been distinctly affirmed in *Weed v. The Saratoga and Schenectady Railroad Company* (19 *Wend.* 534), and *Leetch v. Atlantic Mutual Insurance Company* (4 *Daly*, 518). In those cases it was held that every court of record has power to allow amendments on equitable grounds in every species of action independently of the terms of statutes. In general, any court of record, unless restricted by statute, may grant an amendment of any proceeding within its jurisdiction. This is a power inherent in the court, and its existence is just as necessary for the purpose of administering justice as the power of the court to vacate its process, order, or judgment to prevent an abuse thereof. Moreover, the Revised Statutes of the United States expressly provide:

SECTION 954. "No, summons, writ, declaration, return, process, judgment or other proceedings in civil causes in any court of the United States shall be abated, arrested, quashed or reversed for any defect or want of form, but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down together with his demurrer as the cause thereof, and such court shall amend every such defect and want of form other than those which the party demurring so

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expresses, and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall in its discretion and by its rules prescribe.”

This grant of power, given in a plenary form, is but declaratory of the principles as they exist at common law. I therefore have no doubt of the existence of the power and jurisdiction to entertain the application and to grant it, provided a proper case has been made out for its exercise. As a general rule the court will not permit a party to suffer through any delay or mistake of its own (*Clapp v. Graves*, 2 *Hilt.* 317), nor by the delay or mistakes of its officers (*Chichester v. Caude*, 3 *Cow.* 39; *Neele v. Berryhill*, 4 *How. Pr.* 16; *King v. Harris*, 34 *N. Y. ; S. C.*, 30 *Barb.* 471; *Mechanics' Bank v. Minthorne*, 19 *Johns.* 244). It is only when the rights of third persons which have in the mean time been acquired in good faith intervene, that relief will not be given; but even such third persons cannot rely upon a mere technical error which leaves no doubt about what was intended (*Close v. Gellespey*, 3 *Johns.* 526).

The question therefore remains whether the clerk did omit to do anything in the premises that the law required him to do, and, if so, whether such omission is of sufficient importance to call for a perfection of the record.

The determination of this question involves the construction of the acts of Congress in regard to the naturalization of aliens in force at the time of the admission of the present applicants, and a review of the course and practice of this court in acting under the same. The act of 1802 prescribes as conditions of naturalization that the applicant should have declared two years at least before his admission his intention to become a citizen of the United States (§ 1, subd. 1), and at the time of his application he

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should swear to support the constitution of the United States and renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty, &c., &c. (§ 1, subd. 2), and that such proceedings should be recorded by the clerk (§ 1, subd. 2). In case the applicant bore any hereditary title, or was of any of the orders of nobility in the kingdom or state from which he came, he was, in addition, required to make an express renunciation of such title or order of nobility, and this renunciation had to be recorded in the said court (§ 1, subd. 4). It was also provided that the court admitting such alien should be satisfied that he resided within the United States five years at least, &c., &c., and that during that time he behaved as a man of good moral character, &c., &c. (§ 1, subd. 3). The second section of the same act, which prescribed a form for the registry of aliens desirous of becoming citizens of the United States, had been repealed by the act of May 24, 1828. The third section prescribed that every court of record in any individual State having common law jurisdiction, and a seal and clerk or prothonotary, should be considered as a district court within the meaning of said act, and every alien who might have been naturalized in any such court should enjoy the same rights and privileges as if he had been naturalized in a district or circuit court of the United States. By the act of July 17, 1862, it was further provided that any alien of the age of twenty one years and upward, showing an honorable discharge from the army of the United States, a residence of one year within the United States previous to his application, and a good moral character, should be admitted upon proof of these facts and without any previous declaration of his previous declaration of his intention to become a citizen.

These are all the provisions in force in the year 1868 which it will be necessary to consider. They have

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since that time been incorporated without material change into the Revised Statutes of the United States. From them it will be seen that the only record required to be kept is a record showing the declaration of intention, the oath to support the constitution of the United States, and the renunciation of the foreign jurisdiction and title or order of nobility. No provision existed then, or exists now, except as above stated, as to how the judge presiding over the court should proceed to satisfy himself of the fulfillment of the conditions prescribed, and no provision was made for the preservation of the oral proofs to be given or the attestation of the adjudication to be made, or for the entry of the fact of such adjudication in any book. Of course, courts do and necessarily must keep some record of their proceedings. But in the absence of statutory regulations upon the subject, the extent and manner of keeping it, is left very much to their sound discretion.

What, then, constitutes a record? "A record," says Coke upon Littleton (260, a), "is a memorial or remembrance in rolls of parchment of the proceedings and acts of a court of justice which hath power to hold plea according to the course of the common law, of real or mixed actions, &c., &c. . . . During the term wherein any judicial act is done the record remaineth in the breast of the judges of the court and in their remembrance, and therefore the roll is alterable during that term, as the judges shall direct," &c., &c.

In the course of time rolls of parchment fell into disuse, and the usage sprang up of keeping a memorial or remembrance of the proceedings in a book which was finally designated as the "minute-book." But this book is a thing of very modern date. In it the clerk keeps a brief account of the proceedings of the court, but such account is never verified or attested by

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the signature of the judge. It is not, however, the only form of preserving a memorial or remembrance of the proceedings and acts of a court, nor is it the most satisfactory or trustworthy, because it rests entirely upon the intelligence and fidelity of the subordinate clerk who happens to have the charge of it. An order bearing the signature or the initials of the presiding judge must necessarily be at all times more satisfactory and trustworthy. It was therefore held, in *The Mayor, &c. of Ludlow and Charlton* (9 *C. & P.*) 242, that a document delivered out by the registrar of the court of chancery as the order of the court is the original order, and that to make it evidence it was not necessary that it should be compared with any book of the orders of the court. From all this it follows that the form of the judgment record showing the admission of an alien to citizenship, so far as no express provision for it is made by act of Congress, is utterly immaterial. As long as it constitutes a memorial or remembrance of the adjudication made it is sufficient.

Thus in *Spratt v. Spratt* (4 *Pet.* 406), Chief Justice MARSHALL held :—"The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry ; and, like every other judgment, to be complete evidence of its own validity. The inconvenience which might arise from this principle has been pressed upon the court ; but the inconvenience might be still greater if the opposite opinion be established." In *McCarthy v. Marsh* (5 *N. Y.* 263), this decision was held by the court of appeals to be a binding authority upon all the State courts, and hence that court, against the able argument of Charles O'Connor to the contrary, came to the conclusion that

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the entry in the minutes of the court reciting the compliance of the applicant with the requirements of the law, and showing his admission, contained everything necessary to constitute the entire record of his admission as a citizen; that it was unnecessary for the plaintiff to give evidence in support of the fact recited, and incompetent for the defendant to contradict it, unless by matter of record importing equal verity; and that without such contradiction the record was conclusive. In coming to this conclusion the prior case of *Ritchie v. Putnam* (13 *Wend.* 534), was approvingly referred to by RUGGLES, Ch. J., in which the supreme court, on the authority of 7 *Cranch*, 420, had held that it need not appear by the record that all the preliminary requisites to a naturalization had been complied with, but that the judgment of the court, admitting the alien to become a citizen, is conclusive evidence upon that point. And in coming to the same conclusion, FOOT, J., expressed the following views, viz.:

“All courts look with favor on proceedings to admit aliens to citizenship, and it is just that they should, for the want of acquaintance with our laws and judicial proceedings, the unsettledness of their residences in general for some years, and the consequent liability to lose their documents and papers, should shield them from technical and sharp objections to their naturalization papers whenever there appears to have been an honest intention to become a citizen and comply with the laws of our country.”

Of course, in deciding simply in favor of the sufficiency of an entry in the minutes, the court of appeals did not decide that the entry could not be made in some other way.

It will now be proper to observe the course and practice followed by the superior court of the city of New York in matters of naturalization. Prior to 1858 the preliminary proofs and the oath of allegiance of the

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applicants were in many, if not most cases, written out by the clerk and kept upon loose sheets of paper. The declarations of intention, however, were since November, 1846, kept in a separate book. These loose papers were filed away after the action of the court upon them, as of the date of the respective applications, and kept in the office of the clerk in the same manner as other records were preserved. In passing upon each application, the judge holding the court neither signed the papers nor did he affix his initials, but the clerk was required to note the fact of the judgment of admission by an entry in the minutes. Up to 1858 these entries were made in the minutes; but in that year, no doubt in consequence of the large increase in the number of applications, the practice was changed. Printed blanks came into general use for making the preliminary proofs and taking the oath of allegiance. If the applicant and his witness, after having been duly sworn to make true answers, answered all questions put to them to the satisfaction of the court, the presiding judge, on admitting the applicant to citizenship, signified the fact of having made such adjudication by affixing the initials of his name to the application, and thereupon handed the papers to the clerk, with directions to do whatever might remain to be done; the clerk then, in pursuance of such adjudication, fiat and directions, administered, and the applicant in open court took the oath of allegiance, and a certificate was given to the applicant as evidence of the fact of his admission. The papers containing the fiat of the presiding judge, as aforesaid, were thereupon indorsed and filed among the records of the court as a part thereof, and marked filed as of the date of the respective application. An entry was also made in a book, kept in alphabetical order, showing the date of the admission, the name of the applicant, his nationality, the name of his witness, and the residence of such witness, and if the admission

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was ordered without a previous declaration of intention, either on a discharge from the army, or on the ground that the applicant had arrived in this country during his minority, such fact was specially alluded to. As often as necessary a new book of like character was opened upon the same plan. All the books thus kept were permanently preserved among the records of the court. The first book thus opened and kept bears upon the outside the simple title or label "Naturalization." The one next in order of time is labeled "Naturalization Index." Those opened since October 16, 1868, bear the title "Naturalization Record." The practice, however, of making an entry in the regular minute-book was discontinued. The course and practice as now detailed was observed by the court for the following fifteen years, and under it the promovents now before the court were admitted in 1868.

Now the files and records of this court distinctly show that the said applicants duly complied with all the requirements of the law to be performed on their part, and that all the allegations contained in the affidavits now submitted by them as to the manner in which the court acted upon and granted their respective applications and in which the clerk perfected the record of the proceedings are true. There is, in addition to the differences already noticed, only the further difference between them that the entry of the fact of the admission of A. J. Christern and of Heinrich Weinberger is contained in the book labelled "Naturalization Index," and that the entry of the fact of the admission of Arnold Geesemann is contained in the book marked "Naturalization Record." But the difference in the designations of these books is of no importance, because regard must be had to their contents rather than their outside appearance.

In whichever aspect the case may be considered it clearly and distinctly appears that the clerk, in the

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performance of the duties assigned to him in these proceedings, was guilty of no omission which rendered the record, as made up by him, invalid. When the presiding judge, on giving judgment in each case admitting the applicant to citizenship, attested the fact thereof by affixing his initials to the preliminary proofs, and delivered the papers so attested to the clerk with the direction, express or implied, to do all that remained to be done, the judicial function was completed, and only ministerial acts remained to be done; and the papers so handed over, together with the oath of allegiance thereupon administered, became the judgment record of the court on being filed as such by the clerk and by reason of such filing. The record thus made up constituted a sufficient memorial or remembrance within the requirements of the common law. Thus in *Parsons v. Willoughby de Broke* (13 *W. R.* 315), it was held by COCKBURN, Ch. J., and CROMPTON, BLACKBURN and MELLOR, JJ., that a document becomes a record of the court by being delivered to the proper officer of the court, and received and filed by him as such, although it is not numbered or docketed.

If, on the other hand, it be deemed of importance that an entry should be made in some book, the entries contained in the books marked "Naturalization Index" and "Naturalization Record" fully answer every requirement that can be made in that respect. These books are in the nature of special minute-books. They contain the record of special proceedings entertained by the court not in the exercise of its ordinary or general jurisdiction as a court of the State of New York, but in the exercise of a jurisdiction specially delegated to it by act of congress; and the entries, as they appear therein, present in themselves a better and more detailed record, and at the same time one which is better adapted for purposes of ready reference, than the ordinary entry of the fact of admission would

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present or be if inserted in the general minute-book of the court. There is no law or rule which forbids this court to keep as many minute-books as it may deem expedient.

In any aspect of the case, therefore, the claim advanced by the chief supervisor of elections for the Southern District of New York, to the effect that the judgments of this court, admitting the promovents to citizenship respectively are a nullity for want of an entry in the general minute-book, and that consequently the said parties are not citizens of the United States, is utterly untenable. It rests upon a mere technicality which no court can listen to with patience. His proceedings against the promovents are wholly unjustifiable, for the statutes of the United States, under which he professes to act, confer no such authority upon him.

Section 5,424 of the Revised Statutes provides for the punishment of every applicant or witness who in any proceeding under the naturalization acts, personates any other person than himself, or appears in an assumed or fictitious name, or disposes of or uses any false paper. Section 5,425 makes it unlawful for any person (1) to use or attempt to use any certificate of citizenship, knowing the same to have been unlawfully obtained ; or (2) to knowingly possess a false or forged certificate of citizenship with intent unlawfully to use the same ; or (3) to accept or receive any certificate of citizenship with knowledge that it was fraudently procured.

Section 5,426 makes it unlawful for any person (1) to in any manner use, as evidence of a right to vote, any certificate of citizenship, knowing the same to have been unlawfully issued ; or (2) to unlawfully use or attempt to use a certificate or order issued in the name of any other person. Section 5,427 applies to persons aiding or abetting.

Section 5,428 makes it unlawful for any person (1)

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to knowingly use any certificate of naturalization procured through fraud or by false evidence, or issued by the clerk or any other officer of the court without any appearance and hearing of the applicant in court and without lawful authority; or (2) to falsely represent himself to be a citizen of the United States, without having been duly admitted to citizenship, for any fraudulent purpose whatever.

Section 5,429 provides that the provisions of the five preceding sections shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceedings for naturalization may be commenced or attempted to be commenced.

These provisions originally constituted the act of July 14, 1870, entitled, "An Act to amend the naturalization laws and to punish crimes against the same, and for other purposes." Prior to 1870 false swearing by either applicant or witness in a State court could only be punished, as decided in *The People v. Sweetman* (3 *Park. Cr.* 358), by the courts of the United States; and whether an indictment would lie in any such case depended upon the statute of the United States relating to perjury.

Fraud, other than perjury, could not, prior to 1870, be punished criminally at all unless the particular offense could be brought within the thirteenth section of the act of March 3, 1813, entitled "An Act for the regulation of seamen on board the public and private vessels of the United States." That section made it a felony to falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, any certificate or evidence of citizenship referred to in the act: or to pass, utter or use as true any false, forged or counterfeited certificate of citizenship; or to make sale or dispose of any certificate of citizenship to any person other than the person for whom it was originally issued and to whom it may of right belong.

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These provisions having been found inadequate, congress passed the act of July 14, 1870.

The provisions of this act apply only to offenses committed subsequent to the passage of the act. But in order to provide as far as possible a remedy against false and fraudulent certificates of citizenship previously obtained, and yet avoid the objection which might be raised to an *ex post facto* law, the use of such certificates, and even their possession with intent to use them, was prohibited as therein provided. The certificates the use or possession of which is thus prohibited may be divided into four classes, viz: 1. Certificates which are forged or counterfeit and hence are not at all the act of the court whose seal they profess to bear. 2. Certificates which, though genuine in all respects and issued pursuant to the direction of the court, were procured by or for the applicants named therein by means of some imposition or fraud practised upon the court. 3. Certificates issued by the clerk or other officer of the court without lawful authority in cases in which there was no appearance and hearing of the applicant in court; and, 4. Certificates issued to a person other than the one who uses or attempts to use them. But the prohibition does not apply to a case in which there was an honest compliance on the part of the applicant with the requirements of the law, and the court, in the exercise of its jurisdiction, made or gave the proper order or judgment, but of which the clerk neglected to make an entry, though he filed it, and although he issued the certificate; in such a case the certificate is valid and conclusive. Much less does it apply to a case like the cases at bar, in which everything was done which the law and the practice of the court required to be done.

If the chief supervisor of elections were possessed of evidence showing that the promovents procured their admission to citizenship by means of a fraud or

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imposition practised upon the court, and would lay such evidence before this court, I should not hesitate for a moment to vacate the judgments. In all such cases this court will most cheerfully co-operate to punish the guilty parties. Moreover, if such proof exists in any case the guilty party should be indicted and tried in the federal courts, and the offense committed should not be condoned upon a surrender of the false or fraudulent certificate to the chief supervisor of elections, which would leave the record of admission unimpeached, and, under the decisions above referred to, conclusive, and the offender at liberty to procure a duplicate certificate.

But to cast discredit upon the records of this court generally, without possessing any such proof, and that by resorting to the merest technicality in cases in which it is conceded that the applicants duly and honestly complied with all the requirements of the law, is a proceeding which deserves the severest condemnation. From 1858 to 1873 about forty thousand aliens, including over one thousand women, were naturalized by this court in precisely the same manner as the promovents were naturalized. If the records of this court were a nullity as to the latter, they would be a nullity as to every one of the forty thousand persons admitted during that period.

True, in 1873, in addition to all that was done during the preceding fifteen years, the practice of making brief entries in the regular minute-book was resumed, and it has been continued ever since, but this was done because the attention of the court had been drawn, by its present efficient clerk, to the very technicality now insisted upon, and in order to obviate all possible objection on this ground in the future, though possessed of no merit or force. At any rate, this step, taken by way of abundant precaution, cannot detract, as I have

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already sufficiently demonstrated, from the validity of the prior records.

Certainly, in respect to citizenship, it is of inestimable importance. What sovereignty has a right to command his person, his time, his property and to establish the conditions of his domestic relations and the rule of succession for him and those dear to him is a vital question for every man. What civil and political rights he possesses, and to what sovereignty he must look for protection, depends upon his status as a citizen. If these forty thousand persons did not legally become citizens of the United States, and by virtue thereof citizens of their respective States, the title to real estate of the value of many millions of dollars may hereafter be drawn in question. On the other hand, certainty of citizenship is of equal importance to the government. If these forty thousand persons did not legally become citizens none of them can be held subject to military or jury duty by the federal or any State government.

Even, therefore, if a defect in the record existed in consequence of the omission of some ministerial act by the clerk, the United States government, in the absence of a law declaring such defect fatal, could not afford to insist upon it. The United States are so largely indebted to immigration for their power, greatness and prosperity that it would be an act of folly to return to the illiberal policy of George III., who, in consequence thereof, stands charged in the Declaration of Independence with having endeavored to prevent the population of the States by obstructing the laws for the naturalization of foreigners and by refusing to pass others to encourage their immigration hither.

I think I have now conclusively established that there is no defect whatever in the record of the admission of the promovents, and that even if absence of an entry in the general minute-book could be deemed

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a defect it is one which is immaterial and whose disregard is demanded by every consideration of public policy. Indeed, it is one of the fundamental principles of the law that every court is the guardian of its own records and master of its own practice (*Broom's Leg. Max.* 127).

There being no defect in the record which requires perfection by amendment the motions must be denied on the ground that no necessity exists for granting them. Heinrich Weinberger, however, may have a duplicate certificate of citizenship in case the chief supervisor of elections shall persist in detaining the original.

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MEMORANDUM CASES.

JOHN A. WYMAN, PLAINTIFF AND RESPONDENT, v.
JANE A. CHARLICK, AND OTHERS, EXECUTRIX,
&C., OF OLIVER CHARLICK, DECEASED, DEFEND-
ANTS AND APPELLANTS.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

The appeal was from a judgment in favor of plaintiff entered on the report of a referee. The point presented was whether the judgment should be reversed on questions of fact.

Robert S. Brown, for appellant.

Richard H. Huntley, for respondent.

SEDGWICK, J., wrote for affirmance.

SPEIR and FREEDMAN, JJ., concurred.

Statement of the Case.

**FREDERICK A. POTTS, PLAINTIFF AND RESPOND-
ENT, v. ISAAC MAYER, IMPLEADED, &C., DE-
FENDANT AND APPELLANT.**

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

The action was brought against Elkin Hyman and Isaac Mayer as members of the firm of Hyman & Mayer, upon a promissory note for \$1,571.34, made by them to their own order and indorsed to defendant Kohn, who before its maturity indorsed and delivered it to the plaintiff. It appeared on the trial that the note was given to Hyman for a debt which Mayer owed him. Hyman transferred it to Kohn in consideration of \$1,200, paid by Kohn for Hyman's account. Plaintiff received the note from Kohn and gave him credit therefor as so much cash. The note was protested at maturity for non-payment, and plaintiff took it up with his own check and charged it back to Kohn, who paid plaintiff nothing on account of the note.

The court directed a verdict for the plaintiff; from the judgment entered on which, defendant, Mayer, appealed.

George N. Carpenter, for appellant.

Richard S. Newcomb, for respondent.

SPEIR, J., wrote for affirmance with costs.

SEDGWICK and FREEDMAN, JJ., concurred.

Statement of the Case.

MICHAEL L. DOYLE, ET AL., PLAINTIFFS AND RESPONDENTS, v. GEORGE H. SHARPE, DEFENDANT AND APPELLANT.

I. U. S. BANKRUPT LAW.

1. Marshal.

(a.) Powers and duties in seizure of property of bankrupt.

Before SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

William A. Boyd and Charles E. Whitehead, of counsel, for appellant.

Arnoux, Rich & Woodford, attorneys, and Wm. H. Arnoux, of counsel, for respondent.

This was an appeal from a judgment in favor of plaintiffs.

SPEIR, J., wrote for affirmance, holding the case of Doyle v. Sharpe, 41 *N. Y. Superior Court*, p. 312, was conclusive on all the questions involved.

FREEDMAN, J., concurred.

Statement of the Case.

**THE FARMERS AND MECHANICS' NATIONAL
BANK OF BUFFALO, PLAINTIFFS AND RESPOND-
ENTS, v. THOMAS ATKINSON, IMPLEADED WITH
ERASTUS S. BROWN, DEFENDANT AND APPEL-
LANT.**

Before SEDGWICK and SPEIR, JJ.

Decided June 25, 1877.

Appeal from judgment entered on verdict for plain-
tiff.

This case involved the same questions as are pre-
sented in the case of the Farmers and Mechanics' Na-
tional Bank of Buffalo v. Brown, Logan and Preston,
reported 10 *J. & S.* 522.

The decision in this case is governed by the decision
in that.

SPEIR, J., wrote for affirmance with costs.

SEDGWICK, J., concurred.

**GEORGE F. JOHNSON, PLAINTIFF AND RESPOND-
ENT, v. JOSEPH PHILIPS, ET AL., DEFENDANTS
AND APPELLANTS.**

Before SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

Statement of the Case.

Appeal from judgment entered upon verdict for plaintiff directed by court, and from order denying motion for new trial.

The case involves only questions of fact.

J. H. Whitlegge, for appellants

Benjamin Merritt, for respondents.

SPEIR, J., wrote for affirmance with costs.

FREEDMAN, J., concurred.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, PLAINTIFF AND APPELLANT, v. GEORGE T. PATTERSON, AS ASSIGNEE, &C., DEFENDANT AND RESPONDENT.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

Appeal by plaintiff from judgment entered on verdict directed in favor of defendant.

F. C. Cantine, for appellant.

J. Hampden Dougherty, for respondent.

FREEDMAN, J.—By the agreement executed by certain creditors of McDonald, Dillont & Company, a corporation organized under the laws of New York, in which the plaintiff, as one of such creditors, joined, it was clearly contemplated between the parties thereto

Statement of the Case.

that the assignee to be appointed by the company should not be liable for rent accruing between the execution of the assignment and the first of May thereafter ensuing, but that such rent should be paid *pro rata* under the assignment. An immediate sale at auction might have involved a heavy sacrifice, and to prevent this, and to enable the assignee to close out the stock by sales at retail, the above arrangement seems to have been resorted to, as being to the advantage of all parties.

The plaintiff having become a party to the agreement, and the assignment having been made upon the faith thereof, and without passing the lease to the assignee, and the latter having apparently acted under it in good faith, the plaintiff cannot now be permitted to turn around and to hold the defendant liable for the same rent as assignee of the term. As the case stands, it can make no difference whether the assignment was or was not valid.

The judgment should be affirmed with costs.

SEDGWICK and SPEIR, JJ., concurred.

MARY BOCKOVER, ADMINISTRATRIX OF JAMES H. BOCKOVER, DECEASED, PLAINTIFF AND RESPONDANT, v. WILLIAM A. HARRIS AND WILLIAM M. HALSTED, IMPEADED WITH OTHERS, DEFENDANTS AND APPELLANTS.

COUNTER-CLAIM—SET-OFF—RECOUPMENT.

1. NOT ALLOWED, WHEN.

(a) *Joint claims in favor of two out of a number of defendants cannot be counter-claimed, set-off or recouped, when the action is*

Opinion of the Court.

such that a joint judgment cannot be rendered against such two, separately from the others.

1. PARTNERSHIP, ACTION FOR ACCOUNT.

(a) The administratrix of B. brought action against H. and A. and several others, alleging a copartnership between B. and the defendants, and demanding an accounting. H. and A. put in a joint answer, whereby they denied the allegations of the complaint; and for a second defense averred that they, being members of a certain firm, entered into an agreement with the plaintiff in their individual capacities, whereby they employed him to render services for them, and in effect averred that all the services he rendered, and all that he did either for them or the firm, were rendered and done under that agreement; and for a third defense, by way of counter-claim, they set up what they relied on as a cause of action in their joint favor against the plaintiff, arising out of the agreement in the second defense referred to. *Plaintiff demurred to the third defense. The demurrer was sustained at special term, SANFORD, J., writing, holding above propositions. The answering defendants appealed.*

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

Evarts, Southmayd & Choate, attorneys, Joseph H. Choate, of counsel, for appellants.

Weeks & Forster, attorneys, George H. Forster, of counsel, for respondents.

PER CURIAM.—The opinion of Judge SANFORD fully sustains the order appealed from. It may be added that on the complaint in its present form, the plaintiff could not have judgment against the two defendants who set up the counter-claim, upon the agreement stated in the counter-claim.

Order affirmed with costs.

Statement of the Case.

FRANCIS B. HEGEMAN, PLAINTIFF and RESPOND-
ENT, v. MARY A. CANTRELL, DEFENDANT,
APPELLANT.

Before SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

Appeal from a special term order denying defend-
ant's motion for leave to make and serve a proposed
case and exceptions.

Henry H. Morange, for appellant.

A. H. Wagner, for respondent.

PER CURIAM.—Order affirmed with costs and dis-
bursements.

ELIZABETH N. DEAN, PLAINTIFF AND APPELLANT,
v. THE N. Y. CENTRAL AND HUDSON R. R.
R. COMPANY, DEFENDANT AND RESPONDENT.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided June 25, 1877.

Appeal from judgment for defendant on report of
referee.

Robert I. Little, for appellant.

Frank Loomis, for respondent.

The only question involved was whether the evi-
dence was supported by the referee's findings of fact.

PER CURIAM.—Judgment affirmed with costs.

Statement of the Case.

**NEW YORK GUARANTY AND INDEMNITY
COMPANY OF THE CITY OF NEW YORK,
PLAINTIFF AND APPELLANT, v. ANDREW L.
ROBERTS, IMPLEADED WITH LYDIA J. ROB-
ERTS, VALENTINE GLEASON, ——— GLEA-
SON, AND ——— CORP, DEFENDANT AND
RESPONDENT.***

**I. EXECUTION AGAINST THE PERSON IN CUSTODY UNDER ORDER OF
ARREST.**

1. OUTSTANDING FI. FA.

*(a.) Right of defendant in custody under order of arrest, in respect
to execution against the person, notwithstanding outstanding fi. fa.*

1. After the expiration of three months from the entry of judgment, upon his executing and delivering to the sheriff a stipulation, consenting that his person be taken under an execution against the person, to be issued by the plaintiff, and releasing the sheriff from all liability, by reason of his executing such execution against the person, as directed by the plaintiff in accordance with law, and as demanded by him of plaintiff, and on executing and delivering to the plaintiff a stipulation, consenting and demanding that plaintiff issue an execution against his person, and in consideration thereof agreeing with the plaintiff that the issuing of such execution, and the taking of his person in execution thereunder, should in no way prejudice the rights of the plaintiff under process against the property of said defendant, and that plaintiff shall have the same right to proceed with and enforce process against property, as if an execution against the person had not been issued, and releasing plaintiff from all liability by reason of issuing execution against the person ; and on executing and delivering to plaintiff, with such of his co-defendants as are similarly situated, a stipulation, consenting that plaintiff may issue execution against their persons, notwithstanding process against their property has not

* The order has been affirmed by the court of appeals.

Statement of the Case.

been returned, and releasing plaintiff from any liability by reason thereof, and demanding the issue of execution against their persons ; *he will be entitled to an order discharging him from custody, unless plaintiff charge him in execution, within a time limited in the order.*

2. FI. FA. ISSUE AND RETURN OF, BEFORE EXECUTION AGAINST THE PERSON.

(a.) Waiver of.

The statutes requiring an execution against the property to be issued and returned before an execution against the person can be issued, are intended *for the benefit of the defendant against whose person the execution is to be issued, and can be waived by him.**

Before SPEIR and FREEDMAN, JJ.

Decided November 5, 1877.

This is an appeal from an order of date July 2, 1877, directing that the defendant, Andrew L. Roberts, be discharged from custody unless plaintiff issue execution against his person within a certain time limited by the order.

Defendants, Andrew L. Roberts and Valentine Gleason, were arrested under an order of arrest in this action, judgment having been rendered in the action against the defendants, Andrew L. Roberts, Lydia J. Roberts, Valentine Gleason, ——— Gleason, his wife, and ——— Corp ; execution was duly issued thereon against the property of all those defendants, and that execution is still unreturned by the sheriff.

Plaintiff moved against the sheriff to compel him to return the execution, and its motion was denied.

* The effect of the decision, it would seem, is also to hold that the general rule that the taking the body under a *ca. sa.* is satisfaction of the judgment, as laid down in *Graham's Practice*, p. —, is a personal one in favor of the defendant so taken, and may be waived by such defendant; and upon his sole consent to that effect, the taking of his body will cease to so operate.

Statement of the Case.

After the expiration of three months from the entry of judgment, motion was made to discharge defendant, Andrew L. Roberts, from imprisonment, by reason of plaintiff's neglect to charge him in execution, and that motion was denied. The sheriff's excuse for not returning the execution against the property was that he had process in his hands issued prior to the execution in this action, in other actions, and that such actions are undetermined.

Thereupon defendant, Andrew L. Roberts, upon affidavits and certain stipulations duly executed and acknowledged, *again* moved that plaintiff be required by an order of this court to issue execution against his person. Upon which motion the order appealed from was made.

The stipulations were as follows :

SUPERIOR COURT OF THE CITY OF NEW YORK.

NEW YORK GUARANTY AND IN-
DEMNITY COMPANY OF THE
CITY OF NEW YORK,

against

LYDIA J. ROBERTS, ANDREW L.
ROBERTS, VALENTINE GLEASON,
and AMELIA GLEASON,

Impleaded, &c.

Whereas, an execution against the property of the defendants in the above entitled action was duly issued, on the 31st day of January, 1875, to Matthew T. Brennan, then sheriff of the city and county of New York, which execution has been duly transferred to you, and has not yet been returned, and

Whereas, I have executed and delivered to the plaintiff a stipulation demanding that an execution issue against my person, and releasing the said plaintiff from liability by reason thereof.

Statement of the Case.

Now I, Andrew L. Roberts, one of the defendants in the above entitled action, do hereby consent that you, the sheriff of the city and county of New York, do take my person in execution under an execution against the person to be issued herein by the plaintiff, and I do hereby release and discharge you, the said sheriff, from all liability, claims, damages and suits, by reason of your executing the said execution against my person, as directed by the plaintiffs, in accordance with law, and as so demanded by me.

ANDREW L. ROBERTS.

June 29, 1877.

To BERNARD REILLY, Esq., Sheriff, &c.

SUPERIOR COURT OF THE CITY OF NEW YORK.

NEW YORK GUARANTY AND
INDEMNITY COMPANY OF THE
CITY OF NEW YORK

against

ANDREW L. ROBERTS and others.

Whereas an execution against the property of the defendants in the above entitled action was issued herein, on the 31st day of January, 1875, to the sheriff of the city and county of New York, and the said execution has not been returned by the said sheriff, and by reason thereof plaintiff has not issued execution herein against the person of this defendant.

Now therefore I, Andrew L. Roberts, one of the defendants in the above entitled action, do hereby consent and demand that the plaintiff herein forthwith issue an execution against my person in this action, and in consideration thereof I do hereby agree to and with the plaintiff that the issuing of such execution and the taking of my person in execution thereunder shall in no way prejudice the rights of the plaintiff under the at-

Statement of the Case.

tachment herein and the said execution against the property of the defendant, and that the plaintiffs shall have the same right to proceed with and to enforce the said execution against property as if an execution against my person had not been issued, and I hereby release and discharge the plaintiff of, and from any and all suits, claims and damages, by reason of the issuing of such execution against my person.

Dated June 29th, 1877.

ANDREW L. ROBERTS,
WILLIAM SUTPHEN,
Attorneys for defendant Roberts.

NEW YORK SUPERIOR COURT.

THE NEW YORK GUARANTY AND
INDEMNITY COMPANY OF THE
'CITY OF NEW YORK

against

ANDREW L. ROBERTS and VALEN-
TINE GLEASON *et al.*

Whereas, an execution against the property of the defendants in above entitled action has heretofore, and more than sixty days previous hereto, been issued to the sheriff of the city and county of New York, and the same has not yet been returned, and whereas the said sheriff neglects and refuses to return said execution, and by reason thereof the plaintiff is unable, and believes it to be illegal, to issue execution against the persons of these defendants.

Now therefore, we, two of the above named defendants, now confined in Ludlow street jail, under an order of arrest in said action, do hereby consent that the plaintiff may forthwith issue execution against the persons of these two defendants, notwithstanding said

Opinion of SANFORD, J.

execution against the property of the defendants has not been returned, and we do hereby release the plaintiff from any suits, claims, or damages, by reason thereof.

And we do hereby severally demand that the plaintiff forthwith issue said execution against the persons of these two defendants.

ANDREW L. ROBERTS,
VALENTINE GLEASON.

The following opinion was rendered at special term :

SANFORD, J.—I denied the motion to discharge defendant from imprisonment under section 288 of the Code, on the ground that the unexecuted attachments, and outstanding execution against property in the hands of the Sheriff, sufficiently excused the omission of the plaintiff to charge defendant's person in execution within three months after the entry of judgment, and constituted good cause to the contrary within the meaning of that section.

I am of opinion, however, that the provision of the statute, express or implied, which prohibits the issuing of an execution against the person, while there is an execution against his property not returned (2 *R. S.* p. 364, § 6; *Code*, § 288), are intended for the benefit of the execution debtor, and may be waived by him; that such waiving, accompanied by a stipulation to the effect that the remedies of the judgment creditor under his attachment and execution against property, shall be in no wise impaired by the issuing of an execution against the person of his debtor, and releasing him from all liability by reason thereof, removes all obstacles to the issuing of such an execution, and entitles the defendant to his discharge in so far as such outstanding attachments and executions against property constitute cause to the contrary.

The defendant having now executed, acknowledged,

Statement of the Case.

and tendered such waiver and stipulation is, in my opinion, entitled to be discharged, unless the plaintiff forthwith charge him in execution in compliance with his demand.

The order will therefore be that he be discharged from custody, unless execution be issued against his person within ten days after the service upon plaintiffs' attorneys of a copy of this order, together with the stipulations submitted on this motion.

PER CURIAM.—The order appealed from should be affirmed, for the reasons assigned by the learned judge who made it.

**BENJAMIN L. LUDINGTON, PLAINTIFF, v. AMOS
C. BELL, IMPLEADED WITH JAMES W. BELL,
DEFENDANT.**

I. JOINT DEBTOR ACT (LAWS 1838, CHAP. 257).

1. *Compromising debtor.*

**(a) ESSENTIAL REQUISITE TO HIS DISCHARGE FROM FURTHER
LIABILITY.**

The execution of the note or memorandum in writing provided for by the statute, is.

II. *Accord and satisfaction.*

1. INDIVIDUAL NOTES GIVEN FOR PART OF A FIRM NOTE.

(a) A firm note being past due, one of the firm gave to the holder his individual four promissory notes, all dated the same day, payable respectively thirty days, two months, three months and four months after date, and certain cash (the notes and cash equalling one-half the firm note, which was not, however, surrendered), under an agreement that the same should be taken and received in full payment and satisfaction of all claims against him on the firm note. The four notes were subsequently paid.

Statement of the Case.

HELD,
not an accord and satisfaction.

Before SPEIR, and FREEDMAN, JJ.

Decided November 5, 1877.

This action was brought to recover the balance due on a promissory note, made by the firm of A. C. & J. W. Bell, payable to the order of the plaintiff.

This note was for \$4,000, and bore date, February 17, 1872, and was payable February 1, 1873.

It was claimed by the defendant, Amos C. Bell, that in January, 1875, he made an agreement with the plaintiff by which, upon payment of \$2,000, he was to be released from all further liability on said note. The evidence tended strongly to establish a verbal agreement to this effect.

It appeared in evidence, that the plaintiff originally held the individual note of the defendant, Amos C. Bell, and that the partnership note on which this action is brought, was given in lieu of such individual note to obtain an extension of time of payment.

It was conceded on the trial, that on January 11, 1875, Amos C. Bell paid \$500 on the note, and gave four notes amounting in the aggregate to \$1,500. Defendant claimed that this was done under the above-mentioned agreement.

At the close of the testimony on both sides, plaintiff moved that the court direct a verdict for plaintiff on the ground that there was no consideration for the alleged agreement, and that nothing short of a release under seal is valid.

The defendant requested the court to submit to the jury the question as to the settlement and compromise of the defendant, A. C. Bell, with plaintiff, and the release of said defendant from all liability to plaintiff on said note mentioned in the complaint.

Statement of the Case.

The court granted the plaintiff's motion, and refused the defendant's request, assigning the following reasons:

THE COURT.—“The substitution of one note for another extends merely the time of payment, but does not work payment; neither does it extinguish the original liability. Hence a compromise, or an attempted compromise by an individual to pay part of the original indebtedness by the substitution of a new note in the place of the original indebtedness works no satisfaction. Nothing short of a release under seal will work a satisfaction.

“This rule, prior to 1838, applied to a case in which one of several partners, or one of several joint debtors, sought to make a compromise for his own individual benefit with a creditor. To release partners and joint debtors, a statute was passed in 1838, which authorizes one of several partners, or one of several joint debtors, to thus release himself. But it does not touch the question whether such a compromise was made, to be established subsequently by parol evidence. The statute prescribes that ‘every such debtor or debtors making such composition or compromise shall take from the creditor or creditors with whom he may make the same, a note or memorandum in writing, exonerating him or them from all and every individual liability incurred by reason of such connection with such copartnership firm, which note or memorandum may be given in evidence by such debtor or debtors under the general issue, in bar of such creditor's right of recovery against him or them.’

“This seems to be a sort of statute of frauds applicable to this class of cases, and as the defendant has not gone to the extent prescribed by the statute, I do not think that he is released. I shall therefore direct a verdict for the plaintiff.”

Defendants excepted to these rulings. The jury

Defendant's points.

under the direction of the court, rendered a verdict for plaintiff for \$2,117.70.

The court directed the exceptions to be heard in the first instance at general term.

George W. Lord, attorney, and of counsel, for plaintiff, urged :—I. It is well settled, that the payment and acceptance of a less sum in satisfaction of a greater one, does not discharge the debt, although the creditor agrees to accept the lesser sum in full satisfaction (*Bunge v. Koop*, 5 *Robt.* 1 ; S. C., 48 *N. Y.* 225, 229).

II. Whether the act of 1838 (chap. 257), entitled “An Act for the relief of partners and joint debtors,” was intended to overturn the principles of law above stated, and whether it was intended to render valid and binding, an agreement between debtor and creditor, which was not founded upon some new and valuable consideration, may be an open question—but, if such was the intention of the legislature, then we say—

III. That the only competent evidence of such agreement is a “note or memorandum in writing,” as required by the second section of that act.

H. T. Cleveland, attorney, and *E. H. Bowen*, of counsel for defendant, urged :—I. The memorandum provided for by chapter 257 of the act of 1838, is not the only competent evidence. The agreement may be proved by common law evidence (*Sedgwick on Statutory and Constitutional Law*, 93, 401 ; *Stafford v. Ingersoll*, 3 *Hill*, 39 ; *Lockwood v. Herrick*, 6 *Cushing*, 465 ; *Rex v. Inhabitants of Birmingham*, 8 *Barn. & Cress.* 29 ; *Cole v. Green*, 6 *Man. & G.* 890 ; 46 *Barb.* 110 ; 59 *N. Y.* 191 ; 12 *Id.* 266 ; 40 *Barb.* 537 ; 2 *Lans.* 455 ; 39 *Barb.* 629 ; 60 *N. Y.* 430, 434 ; 40 *Id.* 537 ; *Jordan & Skaneateles Plank Road Co. v. Marley*, 23 *Id.* 556).

II. The contract was a lawful one. Plaintiff ought

Defendant's points.

to have given the note or memorandum. In equity he will be deemed to have done it (21 *N. Y.* 499 ; 41 *Barb.* 283).

III. The transaction amounted to an accord and satisfaction (Kent v. Reynolds, 8 *Hun*, 559 ; Beach v. Endress, 51 *Barb.* 570 ; Gray v. Barton, 55 *N. Y.* 70, 71). The decisions holding that agreeing to accept or accepting less than the sum due in full, is without consideration, are not cases like this. In this case there was a valuable consideration ; a new security was given, binding A. C. Bell alone. Time of payment was extended, within which time A. C. Bell had no remedy or right of action for contribution, and within which time the other partner might, as in fact he did, become insolvent. The new notes for part of the original debt were (in case the old note remained in force) decidedly prejudicial to A. C. Bell, the maker, as they subjected him to several and separate actions, and if not taken in payment or as a compromise under the act of 1838, they released the other partner, or at least severed the debt, increasing the liability of this defendant, Amos C. Bell, the maker of the new notes. In various ways the giving of the new and individual notes of A. C. Bell, was prejudicial to him if he was not released from the old note, and that is consideration enough. Within the cases before cited, he was discharged from liability on the old note. And the verdict thereon in this action cannot be sustained.

THE COURT, without writing an opinion, overruled defendant's exceptions, and ordered judgment for plaintiff, on the verdict, with costs.

Statement of the Case.

**WILLIAM B. CANFIELD, AND OTHERS, PLAINTIFFS
AND RESPONDENTS, v. THE BALTIMORE & OHIO
RAILROAD COMPANY, DEFENDANTS AND AP-
PELLANTS.**

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

Decided November 5, 1877.

Appeal from a judgment and order denying motion for new trial.

The action was brought against the defendant as a common carrier, for the loss of certain goods shipped by plaintiff. Plaintiff had a verdict. Defendants appealed from the judgment entered on the verdict, and also from an order denying a motion for a new trial.

Hutchins & Platt, attorneys, *Austin G. Fox* and *Waldo Hutchins*, of counsel, for appellant.

Estes & Barnard, attorneys and of counsel, for respondent.

THE COURT, without writing an opinion, affirmed the judgment and order.

Statement of the Case.

THE NEW CASTLE CHEMICAL WORKS, PLAINTIFF, v. THOMAS REED AND CHARLES F. SANBORN, DEFENDANTS.

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

Decided November 5, 1877.

Exceptions ordered to be heard at general term.

Action founded on a refusal by defendants to accept goods shipped to them, as per contract. Plaintiff, having, upon due notice to the defendant, stored the goods, and subsequently sold them, brought this action to recover the difference between the net proceeds of such sale of the goods, and the contract price thereof, being \$434.96 in gold, and also the amount expended in and about the cartage, storage and preservation of said goods, being \$65.48 in currency,

Evidence was given on both sides. In the course of the trial defendants excepted to various rulings, admitting, excluding, and refusing to strike out, evidence.

They also excepted to the denial of their motion, made at the close of plaintiff's case, for a dismissal of the complaint. This motion was not renewed at the close of the testimony on both sides.

The court directed a verdict for plaintiff for \$482.71, in gold (being said sum of \$434.96, and the interest thereon), and for \$72.27, in currency (being said sum of \$65 and interest). No exception was taken to this direction. The exceptions were ordered to be heard in the first instance at the general term.

Anderson & Man, attorneys, and Frederick H. Man, of counsel, for appellants.

Statement of the Case.

O. J. Wells, attorney, and of counsel, for respondents.

THE COURT, without writing an opinion, overruled the exceptions, and ordered judgment for the plaintiff on the verdict.

WILSON SMALL v. THE MAYOR, &c., OF N. Y.
Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

Decided November 7, 1877.

Judgment affirmed with costs.

No opinion.

GEORGE DURYEA, PLAINTIFF AND RESPONDENT,
v. ANDREW LESTER, DEFENDANT AND APPELLANT.

Trial—Conduct of.

1. REQUEST TO SUBMIT QUESTIONS OF FACT TO THE JURY.

(a) Necessity of.

Before SEDGWICK and SPEIR, JJ.

Decided November 12, 1877.

The action was brought to recover commissions for effecting an exchange of personal property for real estate. The evidence was conflicting as to the employ-

Opinion of SPEIR, J.

ment and as to plaintiffs being the procuring cause. The judge charged the jury that if they believed the testimony of the plaintiff, and upon that found that he was employed as a broker, and that whatever services he rendered, he rendered under such employment, then he would be entitled to recover a verdict of \$2,580.50. This was excepted to. There was no request to submit to the jury the question as to whether the plaintiff was the procuring cause. There was no dispute as to the amount the plaintiff was entitled to, if he was entitled to recover at all.

The jury found a verdict for the plaintiff for \$2,580.50. Judgment was entered thereon. A motion was made by defendant for a new trial, which was denied. Defendant appealed from the judgment and the order denying the motion for a new trial.

On the appeal, his counsel urged that the exception to the charge above noted was well taken, because the charge took from the jury the consideration of the question as to whether plaintiff was the procuring cause, and also because it withdrew from the jury the question of the value of the services. He also claimed that the evidence as to employment was insufficient.

Vanderpoel, Green & Cuming, attorneys, and *A. J. Vanderpoel*, of counsel, for appellant.

A. Edward Woodruff, attorney, and *Theron G. Strong*, of counsel, for respondent.

SPEIR, J., writing for affirmance, held that as there was no dispute, but that if plaintiff was entitled to recover at all, he was entitled to recover the amount for which the verdict was given, and as the question of the employment was submitted to the jury, and no request made to submit any other question of fact, there was no ground for the exception. He also held

Statement of the Case.

that the evidence as to employment was sufficient to sustain the verdict on that point.

SEDGWICK, J., concurred.

Judgment and order affirmed with costs.

**THOMAS M. TYNG, PLAINTIFF AND APPELLANT,
v. LUTHER R. MARSH, AND OTHERS, DEFEND-
ANTS AND RESPONDENTS.**

I. *Attorney and client.*

1. AGREEMENTS AS TO ATTORNEY'S COMPENSATION.

1. *Motion to compel a referee to find the reasonable and actual cash value of services, denied.*

(a) The referee found that the questions involved in the case, in reference to services wherein the agreement was made, were novel, difficult and important, and that the preparation for the trial, and the trial, required and involved much labor, study and skill on the part of the defendants, and the same were diligently bestowed by them; he also found the prominent steps taken by defendants in the litigation, that they paid all the disbursements and procured the security on appeal to the court of appeals; he also found that plaintiff was unable to pay fees, and that defendants' compensation in these actions depended on success in one of them; he then found as a twentieth finding, "The compensation so agreed to be paid said defendants was no more than a fair and reasonable compensation to said defendants under the circumstances, and in view of the contingency on which payment of the same depended."

On the settlement of the case the referee was requested to find, among other things:

"What was the reasonable and actual cash value of the entire professional services rendered to the plaintiff by defend-

Statement of the Case.

ants in the management and conduct of the three actions at law referred to in the pleadings, and the value of the services rendered in each of said three actions?

To this, he answered:

"The referee declines to answer this.

"1. Because it is immaterial.

"2. Because there is no evidence in the case which, in the judgment of the referee, would enable him to answer this question other than as stated in twentieth finding of fact in referee's report."

A motion was then made at special term that the case be sent back to the referee with directions to pass specifically and categorically on the matters contained in this request, as well as the matters contained in other requests made. The motion was denied.

HELD,

no error.

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

Decided January 7, 1878.

This action was brought against defendants, who are attorneys at law, to recover the sum of \$14,253.02, being the balance of \$17,253.02, collected by them for the plaintiff from The Commercial Warehouse Company of New York, after deducting the amount which plaintiffs alleged to be a reasonable compensation for their services.

Defendants alleged, that after a long, difficult and laborious litigation in an action brought by the plaintiff against The Commercial Warehouse Company of New York, in which the plaintiff originally acted in person, and in which they were substituted in his place as plaintiff's attorney, they succeeded in collecting from said Commercial Warehouse Company, the sum of \$50,971.19 damages, interest and costs.

That out of this sum they retained \$15,000, and \$2,253.02 (the latter sum being the amount of the costs included in the \$50,971.19), less the sum of \$500, which they loaned to plaintiff, and which had never been

Appellants' points.

been repaid. This retention was under and pursuant to an agreement between them and the plaintiff in respect to their compensation for their services.

The referee reported that defendants were entitled to judgment in their favor on the merits, dismissing the complaint with costs. Plaintiff appealed. The evidence given on the trial was not contained in the appeal book. The only question presented on the appeal from the judgment was, whether the conclusions of law of the referee were supported by his findings of fact.

Plaintiff also appealed from an order denying a motion made by him to compel the referee to make further findings.

Thomas M. Tyng, plaintiff and appellant, in person, on the points mentioned in the head-note, urged :—The referee erred in refusing to pass specifically upon the actual reasonable value of the defendant's services. Not only was this a very material issue in this cause, but the action cannot be properly decided, until this fact is specifically passed upon (*Haight v. Moore*, 5 *J. & S.* 161). There was evidence upon which such a finding could have been made, had the referee deemed it material. The main reason why the referee refused to make a finding upon the subject was that it was immaterial. His refusal to pass upon this question was duly excepted to, and his erroneous action is thus properly presented for review as a question of law (*Code of Civ. Pro.* § 993; *Vanslyke v. Hyatt*, 46 *N. Y.* 259; *Rogers v. Wheeler*, 52 *Id.* 262; *Fallman v. Bressler*, 58 *Id.* 123; *Dalrymple v. Hillenbrand*, 62 *Id.* 5; *Smith v. Glen Falls Ins. Co.*, *Id.* 85). Even if the compensation of the defendants was purely contingent upon their success, that does not make the actual value of their services an immaterial fact here (*Wright v. Wright*, 9 *J. & S.* 432).

Statement of the Case.

Marsh & Wallis, attorneys, *Wm. E. Shepard*, of counsel, for respondent.

FREEDMAN, J., wrote for affirmance.

CURTIS, Ch. J., and SANFORD, J., concurred.

Judgment and order severally affirmed, with costs.

HELEN J. CANZI, PLAINTIFF AND APPELLANT, v.
WILLIAM C. CONNER, SHERIFF, AND OTHERS,
DEFENDANTS AND RESPONDENTS.

Practice.

1. CASE ON APPEAL, SETTLEMENT OF BY THE JUDGE. ALLOWING A PROPOSED AMENDMENT IN ACCORDANCE WITH THE STENOGRAPHIC NOTES.

- (a) *Effect of.* Assumed to have been settled in accordance with the judge's minutes.
- (b) *Weight of.* The evidence furnished by such settlement as to the real fact preponderates over that of the affidavit of the counsel who tried the cause for the party making the case, to the effect that the proposed case embodied the fact as it occurred, and suggesting a cause which might have led to its having escaped the attention and notice both of the judge and stenographer.

Before CURTIS, Ch. J., VAN VORST, and FREEDMAN, JJ.

Decided January 7, 1878

Appeal from an order entered at the request of appellant, allowing an amendment to her proposed case, by which certain exceptions therein stated to have have been taken by her were stricken thereout.

Opinion of the Court, by FREEDMAN, J.

The affidavit mentioned in the head-note was as follows:

“W. S. Wolf, plaintiff's attorney, being duly sworn, says: that I tried the above-entitled action as counsel for the plaintiff, commencing October 3, 1876, and that I sat near the railing in front of the stenographer, and that when Justice SANFORD read the defendant's request to charge at the close of each request, after he announced his decision to charge accordingly, I stated in a low voice, ‘Plaintiff excepts.’ I supposed that the stenographer heard me; at least Louis Canzi, who sat at my side, asked me what I made that speech for. That at the close of the charge I excepted generally and specially to the charge. I was suffering from a cold in my head during said trial, and was partially deaf and could not tell how loud I spoke, but I thought I spoke loud enough for the stenographer to hear me. That the attorneys for Roethlisberger and Gerber have not objected to the case as served, and have served notice of argument for next general term. That the sheriff's attorneys alone object.”

W. S. Wolf, attorney, and *Rocellus S. Guernsey*, of counsel, for appellant.

Vanderpoel, Green & Cuming, attorneys, and *Almon Goodwin*, of counsel for respondent.

FREEDMAN, J., wrote for dismissing the appeal from the order holding the propositions stated in the head-note.

CURTIS, Ch. J., and VAN VORST, J., concurred.

Opinion of the Court, by FREEDMAN, J.

JOHN C. RUST, PLAINTIFF AND RESPONDENT, v.
CHARLES HAUSELT, DEFENDANT AND APPELLANT.

STIPULATION NOT VACATED, WHEN.

Where a party enters into one for the purpose of obtaining that which he could not otherwise have procured, and thereby obtains it, he should not be relieved from it.

Before CURTIS, Ch. J., SANFORD, and FREEDMAN, JJ.

Decided January 7, 1877.

BY THE COURT.—FREEDMAN, J.—In order to obtain a hearing in the court of appeals, the defendant and appellant stipulated that the order made by the general term of this court on May 8, 1876, be amended in certain particulars.

Having thus secured a hearing which he could not have otherwise procured, and compelled the respondent to meet his argument on the merits of the case, it seems to me but just and proper that he should be held bound by it.

The fact that the hearing resulted in an unfavorable decision, furnishes no reason to the contrary:

The motion to vacate the order of November 5, 1877, should be denied with ten dollars costs.

CURTIS, Ch. J., and SANFORD, J., concurred.

Opinion of the Court, by CURTIS, Ch. J.

FRANCIS NEHER, PLAINTIFF AND RESPONDENT, v.
JOHN McDONOUGH, IMPLEADED, &c., DEFEND-
ANT AND APPELLANT.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided February 4, 1878.

Appeal by the defendant McDonough from an order appointing a receiver herein and directing him to pay to the receiver \$346.13.

S. V. Cooper, for appellant.

S. Jones, for respondent.

The court, in an opinion by CURTIS, Ch. J., held as follows:—The facts disclosed upon the appeal show that it was proper, for the protection of the property and of the lien claimed by the plaintiff, as well as the rights of all the parties, that a receiver should have been appointed.

The order appealed from should be affirmed with costs.

SEDGWICK and FREEDMAN, JJ., concurred.

Statement of the Case.

**JULES S. ABECASIS, PLAINTIFF AND RESPONDENT,
v. MORGAN GRAY, DEFENDANT AND APPELLANT.**

WAREHOUSEMEN, THEIR LIABILITY.

A warehouseman is liable for goods stored with him absolutely, unless he can show that they were lost or destroyed through no fault of his own. Mere inability to deliver is itself *prima facie* evidence of negligence. To relieve himself from liability to the bailor, the warehouseman, as bailee, must fully account for the goods, and this he can only do by showing the manner of their loss or destruction, and that the same occurred in spite of proper care and diligence on his part. Thus even proof of larceny or burglary does not of itself relieve the warehouseman. He must, in addition, show that he did not in any wise contribute by any neglect or want of precaution on his part (*Schwerin v. McKee*, 51 *N. Y.* 180; *Coleman v. Livingston*, 37 *N. Y. Superior Ct.* [4 *J. & S.*] 32; *Clafin v. Meyer*, page 1, *supra*).

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided February 4, 1878.

Appeal by defendant from judgment entered upon the verdict of a jury, and from order denying motion for new trial.

Geo. Wilcox, for appellant.

G. A. Seixas, for respondent.

FREEDMAN, J., wrote for affirmance, with costs, laying down above principles, and holding that the case was properly submitted to the jury.

CURTIS, Ch. J., concurred.

Statement of the Case.

CHARLES HAUSELT, FOR HIMSELF, &C., PLAINTIFF
AND APPELLANT, v. FREDERICK VILMAR AND
CHARLES F. TAG, DEFENDANTS AND RESPOND-
ENTS.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided February 4, 1878.

Appeal by the plaintiff from a judgment at special term, dismissing the complaint upon the merits, and from an order of judge at chambers, declining to entertain the plaintiff's motion for an order requiring the judge before whom the action was tried to pass upon or find plaintiff's proposed requests to find.

The action was to vacate and set aside a general assignment for benefit of creditors, without preferences, on ground that same was made to defraud, hinder and delay creditors, &c.

Lewis Sanders, for appellants.

Ed. Solomon, for respondent, Charles F. Tag.

Charles Wehle, for respondent, Frederick Vilmar.

CURTIS, Ch. J., wrote for affirmance of judgment and order appealed from with costs.

FREEDMAN, J., concurred.

Statement of the Case.

ROBERT FLEMING, PLAINTIFF AND RESPON-
DENT, v. THE CONSOLIDATED FRUIT JAR
COMPANY, DEFENDANT AND APPELLANT.

Before CURTIS, Ch. J., and SEDGWICK and
FREEDMAN, JJ.

Decided February 4, 1878.

: Appeal from judgment in favor of plaintiff.

The action was brought by the owner of certain stock against the corporation to compel a transfer thereof upon the books of the company to him. The answer set up ownership of stock in another person, against whom an action had been brought, and an attachment issued, and the stock attached in the hands of defendant. The only question was as to the fact of ownership.

Smith & Woodward, for appellants.

Coudert Brothers, for respondent.

SEDGWICK, J., wrote for affirmance with costs.

CURTIS, Ch. J., and FREEDMAN, J., concurred.

Statement of the Case.

**HELMUTH KRANICH, ET AL., PLAINTIFFS AND
APPELLANTS, v. JOHN REYNOLDS, DEFEND-
ANT AND RESPONDENT.**

QUESTIONS INVOLVED.

1. Whether the evidence was such as to call for a reversal.
2. Whether the referee was bound to find upon the evidence credited by him as an additional fact that the sale alleged in the answer to have been made to the defendant, was in fact made to defendant's wife.
3. Whether the bare fact that notwithstanding the allegations in the answer, the defendant and his wife, in certain parts of their testimony given at the trial, treated the sale as having been made to the wife, was of such controlling importance as to call on the referee to discredit their whole testimony.

Before CURTIS, Ch. J., SEDGWICK, and FREEDMAN, JJ.

Decided February 4, 1878.

The action was for the wrongful detention of a piano. By his answer defendant claimed title by virtue of a sale to him by plaintiffs.

The issues were tried by a referee.

On the trial, the plaintiffs proceeded on the theory that the sale was to defendant, but void by reason of his fraud.

The referee, on conflicting evidence, found for defendant.

From the judgment entered on his report plaintiffs appealed.

Schatz & Salmon, attorneys, and *F. G. Salmon*, of counsel, for appellants.

M. C. Milnor, attorney, and of counsel, for respondent.

Statement of the Case.

FREEDMAN, J., wrote for affirmance, holding: As to the first question in the head-note that it was not; as to the second, that he was not bound to make such finding; and as to the third, that such fact was not of such controlling importance as to call on the referee to discredit the evidence.

CURTIS, Ch. J., and SEDGWICK, J., concurred.

THE NEW BOSTON COAL MINING COMPANY,
PLAINTIFF AND RESPONDENT, v. DANIEL
PACKER, ET AL., DEFENDANT AND APPEL-
LANT.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided March 4, 1878.

Appeal from judgment entered upon the report of a referee.

This case involves only questions of fact.

Weeks & Forster, attorneys, and *George H. Forster*, of counsel, for respondents.

Butler, Stillman & Hubbard, attorneys, and *Thomas H. Hubbard*, of counsel, for appellants.

SEDGWICK, J., wrote for affirmance with costs.

CURTIS, Ch. J., and FREEDMAN, J., concurred.

INDEX.

ACCORD AND SATISFACTION.

A firm note being past due, one of the firm gave to the holder his individual four promissory notes, all dated the same day, payable respectively thirty days, two months, three months and four months after date, and certain cash (the notes and cash equalling one-half the firm note, which was not, however, surrendered), under an agreement that the same should be taken and received in full payment and satisfaction of all claims against him on the firm note. The four notes were subsequently paid. *Held*, not an accord and satisfaction. *Ludington v. Bell*, 557.

ACCOUNTING.

See JUDGMENT, 1.

ACTION.

Action for damages for changing grade of streets (*Laws* 1852, ch. 52). See *Hatch v. Bowes*, 426.

See EQUITY; PARTY WALLS, 2; TAXES AND ASSESSMENTS; TRUSTS.

ADMISSIONS.

See NEW TRIAL, 1.

AGENCY.

1. In case of an agent to sell, with no interest in the subject of sale, a modification of terms of employment may be made at any time before the agent has fully

performed the service for which he was employed; or in case the principal has waived or prevented full performance, then at any time before substantial performance. The effect of modification at such time, is that the agent may decline to further act, or may make a new agreement with the principal as to the terms of his employment; but, if he does neither, and thereafter makes sales, such sales, and his compensation therefor, must be governed by the modified terms. This although he protests against the modification. *May v. Schuyler*, 95.

2. The distinction, as to the time when compensation is earned, between agent or broker to sell on certain specific terms, and agent or broker employed generally to find a purchaser, is as follows: 1st. In the first case he must find a purchaser, ready and willing to complete the purchase on the terms specified. 2nd. In the second case it is sufficient if he brings the parties together, and a sale results in consequence thereof. *Ib.*

3. A settlement, made by the principal with parties from whom he procured the goods which he had employed the agent to sell at certain prices (the agent to receive all above such prices for his compensation), on the basis and statement that he, the principal, was entitled to receive only those prices, is not absolute proof that the principal had not

lawfully modified the original terms of the agent's employment so that he was, in fact, entitled to receive much higher prices than those he thus stated to the third party, on the faith and basis of which statement a settlement was made with such third party. Where the plaintiff has himself proved the fact to be contrary to such settlement and statement, he cannot rely on the settlement and statement as countervailing his proof. Although, on such a state of facts, the inference is that the third party was wronged, and is entitled to recover the difference, yet the agent has no right to hold on to that difference. *Ib.*

4. The mere fact that one is an agent to sell and to receive the proceeds does not make him liable for a tort in case he does not pay over the proceeds on demand, after those proceeds have passed from the specific form in which they were received and have been commingled with the agent's own money. While they remain in the specific form, the principal may become entitled to their possession upon demand. Unless such is the case, to make the agent liable to hold the specific proceeds for the principal, there must be allegations to show that such was his special obligation. In this case, in view of the above principles, the court held, that the order vacating order of arrest should be affirmed. *Robbins v. Falconer*, 363.

See BROKERS.

ALIMONY.

A party entitled to alimony payable in installments, by order of the court, can release and discharge her claim therefor in full and in advance, for a stipulated sum; and where such a release had been made, and subsequently the party making the same moved the court to set it

aside, and on the hearing of the motion, no allegations were made of fraudulent practice, or artifice to induce the party to execute the release, nor facts appeared to impeach the honesty and good faith of the transaction, the court should deny the motion, and refuse to set aside the release. *Smith v. Smith*, 140.

ALLOWANCES.

See COSTS, 2.

AMENDMENT.

See CONTRACTS, 3.

APPEAL.

1. Where an appeal has been dismissed on the consent of the only appellant, no other party to the action has a right to move the general term afterwards for an affirmance of the order or judgment appealed from. The party appellant or the parties appellants are the only parties who can move the court in favor of the appeal. *Struppmann v. Muller*, 38.
2. General term order granting a new trial in a case tried by jury upon an appeal taken from the judgment entered on such verdict, and from an order denying a motion for a new trial, is not appealable if any material and controverted question of fact is involved, and the general term granted or might have granted the new trial on such question of fact. *Harris v. Burdett*, 60.
3. Although the general term did in fact grant the new trial, solely on questions of law, and so states in its order, yet if the case came before the general term in such form, and the character of the evidence was such, that a new trial might have been granted on questions of fact, the order is not appealable. *Ib.*
4. Such orders are appealable when they affirm the order refusing a new trial on the facts, and

- reverse the judgment on exception. Or where the appellant is legally entitled to have a verdict directed in his favor. *Ib.*
5. In the latter case, if upon consideration of the evidence and proceedings at the trial, this court should determine that any question of fact passed on by the jury was material, the appeal will still have to be dismissed, unless some well-founded material exception was taken at the trial (whether passed on in the general term opinion or not), in which case the order may be affirmed, and judgment absolute rendered. *Ib.*
 6. On appeal from an order the consideration of the general term must be confined to the papers that the order states were read on the motion. If in fact papers not recited in the order were read on the motion, the defendant, before appealing, should have applied to the court to have the order amended in that respect. *Smith v. Smith*, 140.
 7. In case of general objection made upon the trial, such objections only can be raised under it on appeal, which, if specified, would have been decisive of the case, and could not have been met or obviated at the trial. *Daly v. Byrne*, 261.
 8. In case of remarks of the judge in passing on questions arising on the trial, a case on appeal to call for a new trial must show how the remark came to be made, in what way and in what connection it was called forth, so that the appellate court can see wherein, if at all, the appellant was injured. *Ib.*
 9. General exception to refusals to charge raises nothing for the appellate court to act upon. So held of an exception in this form: "I also except to your honor's refusal to charge our requests." *Ib.*
 10. In case of charge to disregard all that counsel has said of irrelevant matter, it is necessary to present an exception thereto for review, that the appeal book should either show that the party claiming to be aggrieved called the attention of the court specifically to the irrelevant matters that had been spoken of by counsel, or should contain the alleged irrelevant matter. *Woodruff v. Beekman*, 282.
 11. Although when the bases of the judgment in the court below are erroneous, and the case had not then been there considered in all its aspects, the appellate court is for these reasons justified in reversing the judgment and ordering a new trial; yet it may and sometimes will, at the request of respondent's counsel, inquire whether the judgment can be sustained on propositions contended for by said counsel, other than those on which the judgment below proceeded. *Sixth Ave. R. R. Co. v. Gilbert E. R. R. Co.*, 292.
 12. While the erroneous admission of irrelevant evidence ought not to be regarded as constituting sufficient ground for reversal, if it be clear that it was wholly innocuous and could not have affected the result (*Rowland v. Hegeman*, 59 *N. Y.* 643; *Downs v. N. Y. Central R. R. Co.*, 56 *Id.* 664), yet the legal intentment always is that such an error is prejudicial to the party objecting (*Coleman v. People*, 58 *N. Y.* 555). That intentment must be clearly repelled, and the error shown to be harmless, in order to justify its disregard by an appellate court. *Havemeyer v. Havemeyer*, 506.
 13. The cases of *Anderson v. Rome, Watertown & Ogdensburg R. R. Co.* (54 *N. Y.* 334), and *Baird v. Gillet* (47 *Id.* 186), are conclusive against disregarding on appeal the erroneous admission of incompetent and illegal evidence, unless it is clear, beyond rational doubt, that the result

was not, and could not, have been affected thereby. *Ib.*

See Costs, 3, 4 ; SETTLEMENT OF CASE.

ARREST.

1. If, according to the averments of a complaint, the plaintiff may have judgment, without proof of any facts which justify an order of arrest under section 179 of Code of Procedure, the court is not precluded from vacating an order of arrest on the ground that the cause of action and the grounds of arrest are identical. *Robbins v. Falconer*, 363.
2. Section 179 of the Code of Procedure does not apply to a case where, by agreement between principal and agent, the agent may use the principal's money as his own, so far as the legal title to it is concerned, while he promises to pay the amount on demand,—i. e., when the agreement contemplates the relation of debtor and creditor,—but only to a case where the obligation of the agent is to return the identical money or its traceable proceeds to the principal. (*McBurney v. Martin*, 6 *Robt.* 502). *Ib.*
3. The mere fact that one is an agent to sell and to receive the proceeds does not make him liable for a tort in case he does not pay over the proceeds on demand, after those proceeds have passed from the specific form in which they were received, and have been commingled with the agent's own money. While they remain in the specific form, the principal may become entitled to their possession upon demand. Unless such is the case, to make the agent liable to hold the specific proceeds for the principal, there must be allegations to show that such was his special obligation. In this case, in view of the above principles, the

court held that the order vacating order of arrest in this case, should be affirmed. *Ib.*

4. The defendant in this case was in custody under an order of arrest. On the following facts, the court held as stated below : After the expiration of three months from the entry of judgment, upon his executing and delivering to the sheriff a stipulation, consenting that his person be taken under an execution against the person, to be issued by the plaintiff, and releasing the sheriff from all liability, by reason of his executing such execution against the person, as directed by the plaintiff in accordance with law, and as demanded by him of plaintiff, and in executing and delivering to the plaintiff a stipulation, consenting and demanding that plaintiff issue an execution against his person, and in consideration thereof agreeing with the plaintiff that the issuing of such execution, and the taking of his person in execution thereunder, should in no way prejudice the rights of the plaintiff under process against the property of said defendant, and that plaintiff shall have the same right to proceed with and enforce process against property, as if an execution against the person had not been issued, and releasing plaintiff from all liability by reason of issuing execution against the person ; and on executing and delivering to plaintiff, with such of his co-defendants as are similarly situated, a stipulation, consenting that plaintiff may issue execution against their persons, notwithstanding process against their property has not been returned, and releasing plaintiff from any liability by reason thereof, as demanding the issue of execution against their persons ; he will be entitled to an order discharging him from cus-

today, unless plaintiff charge him in execution, within a time limited in the order. *N. Y. Guar., &c. Co. v. Roberts*, 551.

ATTACHMENT.

See STAY OF PROCEEDINGS.

ATTORNEY AND CLIENT.

The referee found that the questions involved in the case, in reference to services wherein the agreement was made, were novel, difficult and important, and that the preparation for the trial, and the trial, required and involved much labor, study and skill on the part of the defendants, and the same were diligently bestowed by them; he also found the prominent steps taken by defendants in the litigation, that they paid all the disbursements and procured the security on appeal to the court of appeals; he also found that plaintiff was unable to pay fees, and that defendants' compensation in these actions depended on success in one of them; he then found as a twentieth finding, "The compensation so agreed to be paid said defendants was no more than a fair and reasonable compensation to said defendants under the circumstances, and in view of the contingency on which payment of the same depended." On the settlement of the case the referee was requested to find, among other things: "What was the reasonable and actual cash value of the entire professional services rendered to the plaintiff by defendants in the management and conduct of the three actions at law referred to in the pleadings, and the value of the services rendered in each of said three actions?" To this, he answered: "The referee declines to answer this. 1. Because it is immaterial. 2. Because there is no evidence in the case which, in the judgment

of the referee, would enable him to answer this question other than as stated in twentieth finding of fact in referee's report." A motion was then made at special term that the case be sent back to the referee with directions to pass specifically and categorically on the matters contained in this request, as well as the matters contained in other requests made. The motion was denied. *Held*, no error. *Tyng v. Marsh*, 566.

BANKRUPTCY.

1. A bankrupt discharge cannot be impeached in State court on the ground that it was fraudulently obtained. Cannot be impeached in State court for want of jurisdiction on the ground that the petitioner had not resided nor carried on business, for the six months next preceding the filing of his petition, nor for the longest period during such six months, in the judicial district where the same was presented. *Foillon v. Lawrence*, 885.
2. Although the creditor was in fact wholly ignorant of the bankruptcy proceedings, and his debt was not mentioned nor set forth in the petition or schedules, yet the discharge in bankruptcy discharges the debt. *Id.*
3. Powers and duties of marshals on seizure of bankrupt's property. See *Doyle v. Sharp*, 545.

See RES ADJUDICATA.

BILLS, NOTES AND CHECKS.

1. A holder of a note cannot, by any agreement with the maker, without the consent of the indorser, change the original contract, or affect the remedies of the indorser against the maker, without discharging the indorser. *Germania B'k v. Frost*, 117.
2. When judgment has been con-

fessed upon a promissory note, execution issued, and levy made upon property of the maker as security, the payee discharges the indorser by satisfying such judgment without the indorser's knowledge or assent. *Ib.*

3. An indorser of certain promissory notes, having consented that the holder might compromise with maker, and agreed to still remain liable as indorser for full value of notes, and said holder, with other creditors, having signed a composition deed agreeing to take fifty per cent. of their claims, which was the compromise to which the indorser consented, and said holder afterwards, in violation of said agreement, having demanded and received, in lieu of the original notes, without the indorser's knowledge or assent, notes for one hundred per cent. of his said claim, such notes are void as being in fraud of creditors, and the indorser is released from his agreement. *Ib.*
4. The law and decisions in regard to several kinds of promissory notes, and the practice and pleadings when they are the subject-matter of the action, fully discussed in the points of counsel and the opinion of the court. *Paine v. Noelke*, 176.
5. The holder of a past-due note surrendered it to the maker in consideration of having previously received from him a note made by a third person, payable to him, and indorsed by him, which note was not due at the time of the surrender. *Held*, that this was parting with a valuable consideration, so as to shut out the equities between the maker and indorsee of the latter note. *Nickerson v. Ruger*, 258.
6. The original entries in the protest-book of a notary who is dead, are proper evidence to show demand and notice of non-payment, and such entries should

be admitted by the court (3 *R. S.* 5th Ed. 474, § 36). *Nat'l Butcher's, &c. B'k v. DeGroot*, 341.

7. When the word "mailed" appears in a memorandum in the official register of a deceased notary, it is consistent with reason, and the meaning of the term, to presume that it describes what that act in its ordinary performance calls for,—i. e., placing a letter in the post-office, with postage prepaid, to be delivered under public authority. *Ib.*

See CORPORATIONS, 2, 3.

BROKERS.

1. Purchases of cotton for future delivery by a broker for his principal, are not in contravention of the statute against gaming and betting, unless it appears they intended to lay a wager (*Tyler v. Burrows*, 6 *Robt.* 110; *Cassard v. Hinman*, 1 *Bowc.* 207). *Kingsbury v. Kirwin*, 451.
2. It was a proper exercise of discretion on the part of the court (warranted by the proofs in this case), to allow the plaintiffs to amend their complaint at the trial, by inserting an allegation of due notice to the defendant, that he would be closed out if he did not keep his margin good (*Lounsbury v. Purdy*, 18 *N. Y.* 521). And if, after such demand and notice, the defendant failed to keep his margins good, the plaintiff had a right to close the transaction (*White v. Smith*, 54 *N. Y.* 522). *Ib.*
3. The defendant must be presumed to know the usages pertaining to the matters as to which he made his agreement (*Wells v. Bailey*, 49 *N. Y.* 472), and the proofs establish that he was not ignorant of the meaning of the term "closing out," and the mode in which it is done, under like contracts, by cotton brokers. *Ib.*

See AGENCY, 2.

BURDEN OF PROOF.

See TRIAL, 2 ; WAREHOUSEMEN, 3.

CHATTEL MORTGAGES.

See MORTGAGES.

CLAIM AND DELIVERY.

1. A bill of sale of furniture, payable in installments, provided that if default was made in any payment, that then all the payments previously made should be forfeited, and the furniture should be reconveyed and forfeited to the vendor, without consideration. *Held*, that after a demand of payment and a refusal or neglect to pay, that a demand for the furniture must be made before an action for its recovery could be maintained. *Arosemina v. Hinckley*, 43.

2. In such an action the value of the property fixed by the bill of sale, less the amount of the installments paid on the same by the vendee, is the value to be assessed by the jury, in finding a verdict for the plaintiff ; and the interest on such value from the time of the demand, is the amount of damages to be assessed for its detention. *Ib.*

CODE OF CIVIL PROCEDURE.
(NEW CODE.)

- § 1241. *Clark v. Bininger*, 345.

CODE OF PROCEDURE.
(OLD CODE.)

- § 317. *Keyser v. Kelly*, 22.
 § 265. *Harding v. Harding*, 27.
 § 193. *Adams v. Welsh*, 52.
 § 399. *Freeman v. Lawrence*, 288.
 § 179. *Robbins v. Falconer*, 363.

CONSIDERATION.

See BILLS, NOTES AND CHECKS, 5.

CONSPIRACY.

1. Conspirators are joint tort-feasors. The act of one acting in

concert with others, is, in judgment of law, the act of all, and each is liable for all the injurious consequences flowing from it. *Cohn v. Goldman*, 436.

2. Electing to waive the tort as to one of several joint conspirators, and to sue him in contract, hath not the effect of an election to waive the tort as to the others. The others still remain jointly and severally liable in tort. Neither the pendency of the action against the one as to whom the tort is waived, nor a judgment rendered therein without actual satisfaction, will constitute a good plea in abatement or bar. *Ib.*

See PLEADING, 4.

CONSTITUTIONAL LAW.

See EMINENT DOMAIN ; STATUTES, 2.

CONTEMPT.

1. Neglect or refusal to comply with the orders of the court subjects a receiver to punishment by fine and imprisonment, for contempt. *Clark v. Bininger*, 126.
2. The summary jurisdiction of the courts, under the common law, to punish a delinquent officer for disobedience to its lawful order, has not been restricted by statute. *Ib.*
3. It is sufficient if the party charged with contempt had reasonable notice of the application to punish him, and was served with copies of the affidavits upon which it was based. The law does not contemplate an idle ceremony in serving papers that have already been served, and which are in the possession of the party accused, and are referred to in the order to show cause, served on him (*Albany City Bank v. Schermerhorn*, 9 *Paige*, 875). *Ib.*

CONTRACTS.

1. A written contract must be considered as the repository and evidence of the final intentions and understanding of the parties thereto ; and where there is no uncertainty as to its object or extent, or as to its meaning, it is to be conclusively presumed, that the whole contract of the parties, and its object, purpose, and meaning are contained within the writing ; and all oral testimony of conversations or declarations of the parties, previous to or at the time when the contract was completed, should be rejected, as also conversions or declarations of the parties afterwards, in regard to the contract or the subject-matter thereof. *Highlands Oh. Co. v. Mathews*, 89.
2. Purchases of cotton for future delivery by a broker for his principal, are not in contravention of the statute against gaming and betting, unless it appears they intended to lay a wager (*Tyler v. Burrows*, 6 *Robt.* 110 ; *Cassard v. Hinman*, 1 *Bosw.* 207). *Kingsbury v. Kirwin*, 451.
3. It was a proper exercise of discretion on the part of the court (warranted by the proofs in this case), to allow the plaintiffs to amend their complaint at the trial, by inserting an allegation of due notice to the defendant, that he would be closed out if he did not keep his margin good (*Lounsbury v. Purdy*, 18 *N. Y.* 521). And if, after such demand and notice, the defendant failed to keep his margins good, the plaintiff had a right to close the transaction (*White v. Smith*, 54 *N. Y.* 522). *Ib.*
4. The defendant must be presumed to know the usages pertaining to the matters as to which he made his agreement (*Wells v. Bailey*, 49 *N. Y.* 472), and the proofs establish that he was not ignorant of the meaning of the term "closing out" and the mode in which it is done, under like contracts, by cotton brokers. *Ib.*
5. The exercise of the power of a court of equity to reform the language of a written instrument, must be based upon the fact, appearing conclusively, "that both parties to the instrument agreed that it should be in a different form from that expressed by the writing (*Jackson v. Andrews*, 59 *N. Y.* 247; *Mead v. Westchester Fire Ins. Co.*, 64 *Id.* 455). *Kilmer v. Smith*, 461.
6. Where the instrument sought to be reformed is a deed of conveyance, the contract of sale executed before the execution of the deed in question, and which provided for it, is binding upon the parties. Its terms, whereby provision was made as to the form and character of the deed to be executed, must be deemed to be obligatory and expressing at the time, the understanding and agreement of the parties. *Ib.*
7. In this case the preliminary contract did not impose upon the respondent the personal obligation of the payment of certain existing mortgages on the premises conveyed, but did provide that the premises should be conveyed, subject to the lien of said mortgages. The deed in question by its terms, imposed upon the respondent the personal obligation of the payment of those existing mortgages, and in this respect was a departure from the provisions of the preliminary contract, and it not appearing that that this contract was modified in its terms by the parties, and it appearing that the deed was accepted by the respondent as the fulfillment of that contract, and without knowledge of any departure therefrom,—*Held*, that the deed must be reformed so as to make its terms correspond to the contract. No existing custom or practice to have such a clause

- inserted in the deed, although not specifically expressed in the contract, would justify, in a legal or moral point of view, an act whereby the grantor was kept in ignorance of a change, the terms of which subjected him to a personal pecuniary liability not provided for in the preliminary contract; and the evidence offered upon this point was very properly excluded. *Ib.*
8. As to contracts between stockholders for election of directors, &c., see *Hasemeyer v. Hasemeyer*, 506.

CONVERSION.

A larceny of goods, occurring in consequence of neglect of warehouseman, constitutes a conversion by virtue of a wrongful taking, and no demand by the owner is necessary after notification to warehouseman of loss of the goods. *Clafin v. Meyer*, 1.

CORPORATIONS.

1. Stockholders of manufacturing corporations, organized under chap. 40, *Laws* 1848, are not liable, under § 24, for debts of company (among other events) unless suit for the collection of the debt shall be brought against the company within one year after it shall become due. *Jagger Iron Co. v. Walker*, 275.
2. In case of promissory note made and given by corporation to its creditor for a debt owing him, *held*, that so long as the debt for which the note was given remains unextinguished, the liability of the stockholders is in respect thereof only; consequently, to hold stockholders, suit must be brought against the company within one year after that debt became due. *Ib.*
3. Corporation's own promissory note in hands of its creditor does not operate as an extinguishment, within the purview of the statute; this, although the creditor may have procured the note to be discounted and had taken it up on its protest. A judgment obtained upon the debt, or one obtained by the creditor upon the corporation's own note given him for the debt, does not so operate.
4. A corporation has authority to loan money to aid in a work auxiliary to its main business; and if loaned for such purpose, the lender is not responsible for misappropriation. *Cheever v. Gilbert El. Ry. Co.* 478.
5. One who has had the benefit of the act of a corporation done without authority, cannot take advantage of lack of authority. *Ib.*
6. Corporations are entitled to the benefit of the rule which imputes innocence rather than wrong to the conduct of man. *Ib.*
7. Corporations are bound by acts of officers or agents when done in the ordinary discharge of their official duty; though not authorized or executed under its corporate seal. *Ib.*
8. *Held*, upon above propositions, that a treasurer who, with the assent of the president and vice-president, but without the authority of a by-law, resolution of the board of directors, or other assent of the governing body, loaned money of the corporation to aid in a work auxiliary to its main business, the loaning of money being in the ordinary discharge of the official duty of those officers, was not liable to the company for the money loaned, in the event of the borrower not repaying it. *Ib.*
9. The prohibition of Revised Statutes, part 1, title 4, § 4, against assigning property or choses in action to an officer or stockholder for the payment of a debt, covers following case:— Charging to the debit of an officer and assigning to him an ap-

parently lost debt due to the corporation (his credit side of the account being greater than the debt) for which he, by reason of want of authority to do, or neglect of duty in doing, the act, or transaction, out of which the debt arose, is liable to the corporation as well as the debtor, so falls. Such a transaction does not operate to subrogate the officer to the company's rights against its debtor. Such a transaction will not put the officer in the position of an agent who can sue for money or property of his principal, paid or transferred under such circumstances as that it is recoverable back, and appropriate the proceeds of the suit to his own use. *Ib.*

10. An agreement between divers stockholders of a corporation, who together own a majority of all the shares of the capital stock of said corporation, entered into for the purpose of the election of directors, who would manage the affairs of the company in the interest of the stockholders, and thus improve the value of their stock, is not in conflict with the requirements of law, and in no wise derogates from its policy. There is nothing in it that tends to frustrate or interfere with the legal right of the majority of stockholders to delegate to directors of its own choice, the management of the affairs of the company. The following cases, relating to this subject, reviewed : *Fremont v. Stone*, 42 *Barb.* 170 ; *Guernsey v. Cook*, 120 *Mass.* 501 ; *Card v. Hope*, 2 *B. & C.* 661. *Havemeyer v. Havemeyer*, 506.

11. Nor is an agreement made between a like number of stockholders, in regard to holding their stock and selling the same together, invalid and in contravention of public policy and law. *Ib.*

12. The measure of damages for a breach of such an agreement as

the latter, would be the amount of any depreciation in the fair cash market value of the stock occasioned by such breach. A charge by the judge that substantially withdrew from the jury any discretion as to the determination of that depreciation in their assessment of damages, held to be error. *Ib.*

See FRANCHISE ; RAILROADS.

COSTS.

1. An executor or administrator, exempt from costs in an action under and by virtue of section 41, pt. 8, chap. 6, of the revised statutes, cannot be made liable under section 317 of the code. *Keyser v. Kelly*, 22.

2. On motion of the party who inadvertently taxed his costs, the court set aside the taxation so as to remove an objection theretofore made under general rule 56 to a motion made by him for an extra allowance. *Dietz v. Marish*, 87.

3. A party succeeding upon the first trial, and again succeeding upon the new trial (or his opponent failing to recover, in the second trial, enough to carry costs), can include in his bill of costs as taxable items, the amount adjudged to him for costs by the judgment reversed, and the costs and disbursements awarded by the general term, as well as the costs, &c., of the appeal to the court of appeals, and of the second trial. In this case the defendant is entitled to the costs of the first trial, &c., by virtue of the provisions of the code regulating costs. *Isaacs v. N. Y. Plaster Works*, 397.

4. *Sembla*, when an appellate court grants a new trial with costs to abide the event, it is the costs of the appeal, and not the costs of the action, that are allowed (*Howell v. Van Sicklen*, 8 *Hun*, 524 ; *aff'd* by court of appeals, June 5, 1877). *Ib.*

COUNTER CLAIM.

Joint claims in favor of two out of a number of defendants cannot be counter-claimed, set-off or recouped, when the action is such that a joint judgment cannot be rendered against such two, separately from the others. *Bockover v. Harris*, 548.

See PLEADING, 2.

COURTS.

1. The facts presented on the second trial of a case not differing materially from those presented on a former appeal, the decision on that appeal must be followed on the second trial as the law. If there is error in the decision of the general term, the remedy is either by appeal to court of appeals or by motion for a re-argument. *Cooper v. Smith*, 9.
2. A court of record has inherent power, irrespective of statutory provisions, to modify or vacate and set aside its own orders, judgments and proceedings. in its discretion. This power may be exercised in behalf of the party by whom and in whose favor the order or judgment was entered, or the proceeding had. *Dietz v. Farish*, 87.
3. The superior court, under chapter 52 of the laws of 1852, has no jurisdiction upon petition, to determine a disputed title to an award for changing grade of street and direct payment to one of the claimants. Such determination can only be by due process of law, at least in this court. The authority given by the phrase "to be secured, disposed of, and improved as the superior court shall direct," is simply a supervisory one over the chamberlain, with respect to his custody, care, management, and investment of the fund while it is in his hands, and does not authorize its withdrawal from him. *Matter of Hatch*, 89.

4. The summary jurisdiction of the courts under the common law, to punish a delinquent officer for disobedience to its lawful orders, has not been restricted by statute. *Clark v. Binninger*, 126.

See NATURALIZATION LAWS, 1-4 ;
SURROGATES, 6.

COVENANTS.

The criterion for determining whether a covenant runs with the land, is the intention of the parties, and if the covenants be of such a nature that they can run with the land, and the deed expresses such an intent, they bind, not only the original parties, but the subsequent owners of the respective premises (Per DWIGHT, C., *Brown v. McKee*, 57 N. Y. 684). *Mohr v. Parmelee*, 320.

See PARTY WALLS, 1, 2.

CUSTOM.

See CONTRACTS, 4, 7.

DAMAGES.

1. The verdict was for \$1,000. Plaintiff's injuries resulted in the loss of a third finger of the left hand; and it appeared that he was confined ten days in the hospital, and subsequently frequently returned there for treatment; that he was compelled to carry his hand in a sling for three months; that it took eight months to heal, and ever since that injury plaintiff was unable to do the same work that he had been accustomed to before that time, or to earn the same amount of wages. *Held*, that under these circumstances the verdict should not be set aside on the ground that the damages were excessive. *McMahon v. Walsh*, 36.
2. The difference between the contract price and the lowest market price of the articles that

were not delivered as contracted for, constitute the damages for non-delivery. *Highlands Ch. Co. v. Matthews*, 89.

3. In an action of libel, \$2,689.73, *held*, not excessive damages. *Daly v. Byrne*, 261.

4. The measure of damages for a breach of an agreement between certain stockholders in a corporation in regard to holding their stock and selling the same together, would be the amount of any depreciation in the fair cash market value of the stock occasioned by such breach. A charge by the judge that substantially withdrew from the jury any discretion as to the determination of that depreciation in their assessment of damages, *held*, to be error. *Havemeyer v. Havemeyer*, 506.

See CLAIM AND DELIVERY, 2; PARTY WALLS, 2, 3.

DEEDS.

See CONTRACTS, 5-7; COVENANTS.

DEFENSES.

A plea of former recovery against one or more joint tort-feasors, whether in contract or in tort, to be good must also aver actual satisfaction. *Cohn v. Goldman*, 486.

See CONSPIRACY, 2; COUNTERCLAIM; PAYMENT, 2; PLEADING; RECEIPT.

DEFINITIONS.

"Due process of law," means a suit instituted and conducted in accordance with the prescribed course of procedure, for determining the title to property. *Matter of Hatch*, 89.

"Mailed," when used in official register of deceased notary, *held*, to mean placing a letter in the post-office, with postage prepaid, to be delivered under public

authority. *Nat'l B. & D. Bk. v. De Groot*, 341.

"Closing out," as used in cotton brokers' contracts, defined, in *Kingsbury v. Kirwin*, 454.

"Subsequent," as used in statute relating to filing chattel mortgages, *held*, to mean after the time when by statute, the mortgage should have been refiled. *Wray v. Fedderke*, 835.

DEMAND.

See CLAIM AND DELIVERY, 1; EXECUTORS AND ADMINISTRATORS, 1.

DISCONTINUANCE.

1. The plaintiff's right to discontinue on payment of costs terminates when the action passes into judgment, for the defendant can then claim a right to the adjudication, even if the same, was wholly or partially unfavorable to him, and his right does not depend upon the judgment having been actually entered of record. It was enough that a point had been reached which made the action ready for judgment. *Carleton v. Darcy*, 373.

2. In the case at bar, an action of ejectment, the judgment was entered, and execution issued, and plaintiff put in possession of the premises by the sheriff. Subsequently it was vacated, and another defendant added, but the plaintiff was allowed to keep possession of the premises under the execution until a judgment should be rendered in defendants' favor, and after answer of defendants denying plaintiff's right to possession of the premises, and claiming ownership in fee in the same, the plaintiff claims the right to discontinue on payment of costs without a restoration of the possession of the property. Manifestly the plaintiff has no right in this condition of things to discontinue the action to enable him

to bring a new action, or to compel the defendants to bring an action to recover the possession of the property now in the plaintiff under the judgment. *Ib.*

DIVORCE.

1. Notwithstanding the determination of the issues by the referee, in favor of the divorce, the court, in the proper exercise of its supervisory power, upon the hearing of exceptions to the report, may withhold judgment of divorce upon the ground of insufficiency of proof of the alleged adultery, as also for the reason that there was sufficient evidence of condonation. *Harding v. Harding*, 27.
2. But the court cannot on this hearing of the motion to confirm the report, and the exceptions thereto, dismiss the plaintiff's complaint upon the merits. *Ib.*
3. Where a party excepts to a report and brings those exceptions to a hearing, the motion is substantially a motion for a new trial, and the party making it is not entitled to relief exceeding that which is usually awarded to a party successfully moving for a new trial on a case or exceptions under section 265 of the code, namely: No absolute judgment should be given where the question is one that can be determined by further proof; but an order should be entered (if it is a case for a new trial), setting aside the report, vacating the order of reference, and ordering a new trial of the issues, thus leaving the contesting parties free to select any of the modes of trial prescribed by the code. In a case where no answer has been made, nor issue joined, but only a reference to take testimony and report, on the coming in of the report, the court may send back the report to the referee, with directions to take

further proof, if the court deems the proofs insufficient. *Ib.*

4. Former practice of the court of chancery in divorce cases, reviewed, and compared with the present practice. *Ib.*
5. The statutes, practice and rules relating to the same, fully discussed in *Sullivan v. Sullivan* (41 *N. Y. Super. Ct.* [9 *J. & S.*] 519), and in *Blott v. Rider* (47 *How. Pr.* 90).

DOWER.

The facts in this case were such that the court held that a receiver of all the rents and profits could be appointed in action to set off dower, though a prior decree had been entered in partition. Such decree, having been made in 1867 (the dowress being a party defendant), and the sole plaintiff having after decree conveyed all her interest to the only co-defendant of the dowress, such co-defendant being the mother of the defendants in the dower suit (the plaintiff and co-defendant of the dowress in the partition being the sole owner or tenant in common of the fee in the property), and said mother of the defendants in the dower suit having died in 1872, leaving the defendants in the dower suit her heirs at law, and it not appearing that the partition action had ever been revived, or that the defendants in the dower suit had ever been made parties to the partition suit, or that the commissioners appointed by the decree to make partition, and to set-off one-third to the dowress as and for her dower, had ever acted, presents no objection to the appointment of a receiver in the dower suit. *Egan v. Walsh*, 402.

EASEMENTS.

See NEW YORK CITY, 1; PARTY WALLS.

EJECTMENT.

See DISCONTINUANCE, 2.

EMINENT DOMAIN.

1. Impairing its value by the proximity of other property legitimately employed for the public use and benefit under the sanction and by the authority of a legislative enactment, cannot be said to be taking private property for public use in the exercise of the right of eminent domain. *E. g.*, the authorization of a railway parallel with, and competitive of, one already established. *Sixth Ave. R. Co. v. Gilbert El. R. R. Co.*, 292.
2. Authorizing a corporation to use for the public use and benefit such parts of a highway as have not been already appropriated by a corporation, under authority conferred on it, as actually required by it, the use authorized to be made by the former corporation being such as not to interfere materially with the use by the latter of the parts so appropriated by it, is not the taking of private property of the latter corporation. *Ib.*
3. Authorizing a corporation to use for the purpose of a railroad for the public use and benefit streets opened in the city of New York under the act of 1813, or parts thereof, does not take away any property or right of property of the abutting owners in the streets. *Ib.*

EQUITY.

In equity, action will lie to recover interests in property, where parties have obtained the legal title to the same by a series of fraudulent and unconscientious acts and dealings. Where one, by a series of such acts, and by collusion with others, has placed a party in a situation of embarrassment for his own advantage,

and then availed himself of the opportunity to obtain the property of that party, by a purchase or transfer through other parties with whom he is in collusion, at a sacrifice, he can be called to account in an equitable action, although no false statements appear to have been made in the premises. *De Lavalette v. Shaw*, 13.

See CONTRACTS, 5-7 ; JUDGMENT, 1 ; JURY TRIAL.

ESTOPPEL.

1. A judgment necessarily founded on the ground that a party to the action in which it is rendered, is, by certain acts done by him, estopped from setting up the invalidity of a sale of certain property, will estop such party in any action brought by him against the parties to the action in which such judgment was rendered, or their privies, in which the validity of such sale is involved, from setting up its invalidity. *Harris v. Burdett*, 57.
2. One who holds money or property for a party to such action, whose right thereto depends on the validity of such sale, stands in privity to such party as to the money and property so held, so far as to enable him to rely on such judgment as estopping the party against whom the same was rendered from setting up the invalidity of the sale, in an action brought by him against such third person, for the recovery of such money or property. *Ib.*
3. One who has had the benefit of the act of a corporation done without authority, cannot take advantage of want of authority. *Cheever v. Gilbert El. R. R. Co.*, 478.

EVIDENCE.

1. Declarations made by a party to an action at the time of doing

- an act between him and a third person, in the absence of the other party to the action, are not admissible in favor of the party doing the act, when the doing of the act was proved in his behalf. It is otherwise if the other party to the action proves the doing of the act. *Algie v. Wood*, 46.
2. A settlement, made by the principal with parties from whom he procured the goods which he had employed the agent to sell at certain prices (the agent to receive all above such prices for his compensation), on the basis and statement that he, the principal, was entitled to receive only those prices, is not absolute proof that the principal had not lawfully modified the original terms of the agent's employment so that he was, in fact, entitled to receive much higher prices than those he thus stated to the third party, on the faith and basis of which statement a settlement was made with such third party. When the plaintiff has himself proved the fact to be contrary to such settlement and statement, he cannot rely on the settlement and statement as countervailing his proof. Although, on such a state of facts, the inference is that the third party was wronged, and is entitled to recover the difference, yet the agent has no right to hold on to that difference. *May v. Schuyler*, 95.
 3. Receipt purporting to be in full, and to be an absolute bar to all claims and demands, is subject to explanation, and does not conclude the party making the same, from proof of facts and circumstances showing that it was not in full, and that there were existing claims and demands unpaid, although not due at the time the receipt was given (*Ryan v. Ward*, 48 *N. Y.* 204; *Bliss v. Shwarts*, 65 *Id.* 444). *Churchill v. Bradley*, 170.
 4. In examination of party to action against parties claiming under a deceased person, under section 399 of the Code of Procedure, the question "About the time you were introduced to Mr. Garner (the deceased), did you commence any action for him?" is inadmissible, as calling for evidence of employment of the witness by the deceased. *Freeman v. Lawrence*, 288.
 5. Opinion of experts as to value of services, cannot be based on the testimony of a witness or witnesses as to what services were rendered, but may be based on facts stated by witnesses, and claimed by counsel to have been proved by their testimony. Hypothetical questions based on such facts may be put to experts. *Id.*
 6. Evidence of the intentions of the parties executing two chattel mortgages at the same time, as to priority, and as to valuable consideration for the execution of the mortgage, may be given *dehors* the instrument itself, for the purpose of rebutting the statutory presumption of fraud, &c., where the possession of the property remains in the mortgagor (*Baskins v. Shannon*, 3 *N. Y.* 310). *Wray v. Fedderke*, 335.
 7. The original entries in the protest-book of a notary, who is dead, are proper evidence to show demand and notice of non-payment, and such entries should be admitted by the court (3 *R. S.* 5th Ed. 474, § 36). *Nat'l Butchers', &c. Bank v. De Groot*, 341.
 8. When the word "mailed" appears in a memorandum in the official register of a deceased notary, it is consistent with reason and the meaning of the term, to presume that it describes what that act in its ordinary performance calls for,—i. e., placing a letter in the post-office, with postage prepaid, to be de-

livered under public authority.
Ib.

See AGENCY, 3; CONTRACTS, 1;
JUDGMENT, 2; LETTERS TESTAMENTARY, &c., 3; LITERARY RIGHTS; PLEADING, 3; SETTLEMENT OF CASE; TRIAL, 2, 3.

EXCEPTIONS.

See APPEAL, 9, 10; DIVORCES.

EXECUTION.

1. Money collected by a sheriff under an execution cannot, while it remains in his hands, be levied on by him under an execution against the party in whose favor it was so collected. *Adams v. Welsh*, 52.
2. In case of payment to sheriff by debtor of a judgment debtor against whom he holds an execution, the sheriff has no authority to apply it to the satisfaction of an execution issued against the plaintiff in the execution upon which the payment was made. *Ib.*
3. After the original creditor has assigned the debt, the debtor is no longer indebted him; therefore, a payment thereafter made by such debtor to a sheriff holding an execution issued on a judgment recovered against his original creditor, does not fall within the provisions of section 193 of the code of procedure, and is not a discharge of the debt. This although he had no notice of the assignment before such payment. *Ib.*
4. The statutes requiring an execution against the property to be issued and returned before an execution against the person can be issued, are intended for the benefit of the defendant against whose person the execution is to be issued, and can be

waived by him. *N. Y. Guar., &c. Co. v. Roberts*, 551.

See ARREST, 4.

EXECUTORS AND ADMINISTRATORS.

1. Before bringing an action to recover a strictly legal claim against an estate, its owner should present the same to its executor or administrator, pursuant to § 41, tit. 3, chap. 6, of the revised statutes. *Keyser v. Kelly*, 22.
2. An executor or administrator, exempt from costs in an action under and by virtue of that section of the revised statutes, cannot be made liable under section 317 of the code. *Ib.*

See LETTERS TESTAMENTARY, &c.

FICTITIOUS NAMES.

1. *Laws of 1833*, ch. 281, must be construed in connection with ch. 400, *Laws of 1854*, and ch. 144, *Laws of 1863*. *Hennequin v. Butterfield*, 411.
2. *Sembla*, A. lent the use of his name to a firm composed of B. and C., and the firm thereafter carried on business in the firm name of A. & Co. until 1866, when the business ceased, and the proceeds of the assets thereof belonging to B., passed into the hands of A. for management. A separate account, under the title of "A. & Co. of 1866," was kept of those proceeds, to distinguish them from the assets of a firm of "A. & Co." subsequently formed. It seems that a transaction had with D. under the title of "A. & Co. of 1866," whereby B.'s money was loaned to D., the check to D. being signed "A. & Co. of 1866," B. being then deceased, does not fall within the prohibition of the statute, there being no proof that the provisions of the enabling statutes under which the use of a copartnership name may be continued,

had not been complied with.
Ib.

3. In invoking benefit of statute, it is necessary: 1. By plaintiff, that the action must be based on the statute. 2. By defendant, that the defense must be based on the statute. *Ib.*

FRANCHISE.

Act or charter granting franchise to use a public highway for a particular purpose, authorizes the appropriation of so much only as is requisite to carry into effect the design for which the power of appropriation was given, and this privilege is exhausted by the appropriation in fact of so much of the roadway as the exigences of such design actually require. *Sixth Ave. R. Co. v. Gilbert El. R. R. Co.*, 292.

See EMINENT DOMAIN.

FRAUD.

1. In equity, action will lie to recover interests in property, where parties have obtained the legal title to the same by a series of fraudulent and unconscionable acts and dealings. Where one, by a series of such acts, and by collusion with others, has placed a party in a situation of embarrassment for his own advantage, and then availed himself of the opportunity to obtain the property of that party, by a purchase or transfer through other parties with whom he is in collusion, at a sacrifice, he can be called to account in an equitable action, although no false statements appear to have been made in the premises. *De Lavalette v. Shaw*, 13.
2. Fraud is the most subtle of legal elements, and is frequently developed by comparatively trifling facts and circumstances, which, isolated, amount to little,

but which, when united by intellectual power, present the charge made clearly and beyond doubt. In such a case, the conduct of the persons charged, while upon the stand, may have an important bearing upon the determination of the issue. *Cohn v. Goldman*, 436.

See BILLS, NOTES AND CHECKS, 3;
EVIDENCE, 6; PLEADING.

INCUMBRANCES.

See PARTY WALLS.

INJUNCTION.

See RAILROADS, 11; RECEIVERS, 4; REFERENCE.

INSURANCE.

In this case the provisions of a life insurance policy, which declared the claim thereunder forfeited, unless the owner of the policy should, upon the death of the insured, forth with notify the company in writing, &c., of the fact, indicating the nature of the proof of death to be furnished, and unless full proofs should be presented within twelve months from the time the loss occurred,—were *Held*, inoperative on the following grounds: The general agent of the company, an officer authorized to make such representations, stated to the owner of the policy, upon his departure for Europe, and upon his offer to pay certain premiums which would become due in his absence, that the company had agents who would know of the death of the insured before the owner could, “and that there was no trouble at all in regard to the whole thing.” The insured died some time after the return of the owner of the policy, but the fact of his death did not come to the knowledge of the owner till more than twelve months thereafter, and the above provis-

ions of the policy were not complied with. The premiums were regularly demanded by the company and paid in good faith by the owner, after the death of the insured, and until the owner's knowledge thereof. *Held also*, that the owner could recover the premiums paid as above. *Prentiss v. Knickerbocker L. Ins. Co.*, 852.

JOINT DEBTORS.

An essential requisite to the discharge of a compromising debtor under the joint debtors' act (*Laws* 1838, ch. 257), is the execution of the note or memorandum in writing, provided for by the statute. *Ludington v. Bell*, 557.

JUDGE'S CHARGE.

See APPEAL, 10 ; DAMAGES, 4 ;
LICENSE, 2.

JUDGMENT.

1. In the case at bar, the decree directed the surrender of certain premises to the plaintiff, upon the payment by him of a sum found due defendant, as of May 31, 1875, under an accounting embraced in said decree ; which decree also contained a provision, permitting the plaintiff to apply to the court upon the foot thereof, for an account of the rents and profits from said May 31, 1875, to the date of the surrender of said premises, but the said decree contained no express provision for the recovery of the amount which should appear due upon the said accounting. The plaintiff having paid the said sum due the defendant, and the said premises having been surrendered to him as directed,—*Held*, this only operated to satisfy the judgment, *pro tanto*. It did not cut off plaintiff's right to rents and profits after May 31, 1875 ; nor

did it deprive the court of jurisdiction to enforce payment of the amount thereof, when ascertained in the manner prescribed in the decree. The omission of an express provision for the enforcement of the recovery of said amount is of no effect. The equitable powers of the court are not so circumscribed, as that a mere omission to declare them in advance, shall preclude their exercise in a case distinctly provided for by a decree. The principles of the supplemental accounting having been settled by the previous orders and judgment of the court, and the general term having affirmed said principles, they must be deemed conclusively settled for the purposes of this case, so long as the judgment at general term remains unreversed. *Mad. Ave. Church v. Oliver St. Church*, 151.

2. Want of jurisdiction renders void the judgment of any court, and he against whom a judgment is relied on, may attack it for want of jurisdiction, and show, by evidence *dehors* the record, the non-existence of jurisdictional facts, and this although the record recites their existence. The doctrine of *Bolton v. Jacks* (6 *Robt.* 166), approved and sustained in this respect. *Roderigas v. East R. Savings Inst.*, 217.

See CORPORATIONS, 3 ; ESTOPPEL,
1, 2 ; NATURALIZATION
LAWS, 1-3.

JURISDICTION.

See BANKRUPTCY ; JUDGMENT, 2 ;
LETTERS TESTAMENTARY, &c.

JURY TRIAL.

Where the allegations contained in the complaint make out an action in equity for equitable relief, and certain of the allegations make out as to some of the defendants an action at law for legal relief,

the issues of fact joined as to the allegations making out the equitable cause of action are to be tried and disposed of at a special term by the court without a jury; and if the equitable cause of action fails, and so leaves the issues joined on the allegations making out an action at law as to some of the defendants to be disposed of, those issues should be tried by a jury. This although the complaint is as to the legal cause of action in form an action in equity, and the relief prayed in respect thereto is in form equitable relief. This although upon the trial of the cause as an equity action, the defendants as to whom a cause of action at law is made by certain of the allegations in the complaint, as to which issue is joined, did not demand those issues to be tried by a jury *Hennequin v. Butterfield*, 411.

LETTERS TESTAMENTARY AND OF ADMINISTRATION.

1. The jurisdiction of surrogates of State of New York, to grant letters of administration depends on the surrogate's judicial determination, made in a judicial inquiry before him, that death has occurred. *Roderigas v. East R. Savings Inst.*, 217.
2. Where the surrogate signed forms of letters of administration in blank, and left them in charge of a clerk, appointed by him, who, on application being made to him for letters, filled up a blank form of petition therefor, caused the petitioner to sign the same, and swear to the same before him, passed on the sufficiency of the evidence, and then filled up one of such blank forms of letters, and either himself, or by another clerk, affixed thereto the seal of the surrogate's court, and then delivered said form so signed in

blank, so filled up, and so sealed, to the petitioner, upon the execution of the bond required by statute; the surrogate never having seen the petitioner, nor the petition, nor the blank form of letters after it had been filled out, and never having given any instructions as to said blank form so filled out, or as to the issuing letters on the estate of the person over whose estate said blank form so filled up purported to appoint an administrator; there is no such determination and inquiry. Such instrument so purporting to be letters of administration is void. *Ib.*

3. Recital of death of party upon whose estate the letters purport to issue, is not *prima facie* evidence of a fact on which jurisdiction rests, and is not the recital of a jurisdictional fact. *Ib.*
4. Payment on the faith of letters void for want of jurisdiction to the person thereby undertaking to be appointed administrator of a debt due to, or money of, the alleged deceased, will not protect the party so paying, against an action brought therefor by the alleged deceased, he being in fact still in life. *Ib.*

LEX FORI.

When an action is pending in this State, in the absence of proof to the contrary, it will be presumed by the courts of this State, that the law of another State in regard to a subject-matter before the court, is the same as the law in this State. *Paine v. Noelke*, 176.

LIBEL.

See MARITIME LAW.

LICENSE.

1. Injuries necessarily resulting from doing an authorized act, fall within the maxim *damnum*

abeque injuria. Woodruff v. Beckman, 282.

2. W gave B a license to open apertures through the floors and ceilings of his (W's) store. W's goods were damaged by the dust and debris arising from the opening of the apertures. There was a conflict of testimony as to whether there were injuries to the goods other than such as would necessarily result from the licensed acts of B. *Held*, 1. That B was not liable for such damages as necessarily resulted from the doing of the licensed act. 2. That B was liable for such damages as did not so result. And as a result, *held*, 3. That a charge "that if B had a license, and went into the premises by permission of W, but was guilty of depreciating the value of W's goods, he is still liable for the whole damage he has done," was erroneous. *Ib.*
3. An express authority carries with it by implication an authority to do such damage and injury as necessarily results from the performance of the act authorized in express terms. *Ib.*

LIENS.

See MORTGAGES.

LITERARY RIGHTS.

One has a right to dramatize a novel, and such dramatization becomes his property, though there appears in it substantial similarity in plot, situation, and incidents to the novel. *Ergo*, in an action-of libel grounded on a charge made by defendant that plaintiff had committed a fraud by producing a play and claiming to be the author of it, when in fact it was written by another person, and sent to him for examination, and wrongfully retained by him and produced as his own, evidence that the play, being a dramatization by the plaintiff of a novel, is

substantially similar to the novel in plot, situation, and incident, is inadmissible. *Daly v. Byrne*, 261.

MARITIME LAW.

1. Lawful possession of vessel by those ordering the repairs and supplies, at the time of the furnishing thereof, is essential to support a libel in admiralty against vessel for repairs and supplies. *Harris v. Burdett*, 57.
2. One who holds freight money payable to the libellant, by the terms of a charter-party, made by those claimed to be in lawful possession of the vessel, stands in privity to the libellant. *Ib.*

MASTER AND SERVANT.

Where the personal negligence of the master has directly caused the injury, the master's liability to the servant is the same as it would be to a person not a servant. *McMahon v. Walsh*, 36.

MAXIMS.

*Delegata non potest delegari. Rod-
erigas v. E. R. S. Inst.*, 218.
*Damnum absque injuria. Woodruff
v. Beckman*, 282.

MORTGAGES.

1. In case of two chattel mortgages executed by the same person upon same property, but to different persons, dated the same day, and filed the same minute, where it was the agreement and intention of the parties that one should have a preference and priority over the other as a lien upon the property, that agreement must be sustained (*Jones v. Phelps*, 2 Barb. Ch. 440). *Wray v. Fedderke*, 335.
2. This priority of lien of the mortgage and the respective rights of parties having been established, they cannot be affected nor changed by the neglect of the owner of the

mortgage that has the prior lien to refile it, within the year, nor by the diligence of the owner of the other mortgage to refile his in due time. The latter party had notice of the other mortgage, and took his mortgage subject to it. The object or effect of the statute in regard to the annual refiling of a chattel mortgage does not reach his case. He was a mortgagee previous to the omission to refile, and in no sense a subsequent mortgagee in the sense of those words in this statute. *Ib.*

3. The word subsequent, in this statute, as to filing chattel mortgages, is held to mean after the time when by statute the mortgage should have been refiled (*Meech v. Patchin*, 14 *N. Y.* 71). *Ib.*

4. In this case there was evidence of a default in the payment of the first mortgage after a demand was made by the mortgagee from the mortgagor, and this was within the first year after it was given, and thereby the title of the mortgagee to the mortgaged property became absolute (*Burdick v. McVanner*, 2 *Den.* 170). The fact that the mortgagee took subsequent mortgages, upon the same property, from the mortgagor, to secure in part his original debt, did not affect his then existing rights under the first mortgage (*Westcott v. Gunn*, 4 *Duer*, 112). *Ib.*

See EVIDENCE, 6.

MOTIONS.

See APPEAL, 1.

NATURALIZATION LAWS.

1. State courts act under such laws, *quoad hoc* United States courts. The nature of their acts in admitting to citizenship is judicial, and an act of admission

constitutes a judgment. *Matter of Christern*, 523.

2. The preliminary proofs, having thereon the initials of the presiding judge, on being filed in the clerk's office, with the oath of allegiance, constitute a record or roll of the judgment admitting to citizenship. *Ib.*

3. Entry in a book is not necessary. But if it were, an entry made in alphabetical order, in a book entitled "Naturalizations" or "Naturalization Index," or "Naturalization Record," kept in the clerk's office as part of the records of the office, showing the date of the admission, the name of the applicant, his nationality, the name and residence of the witness, and if the admission was ordered without a previous declaration of intentions, either on a discharge from the army or on the ground that the applicant had arrived in this country during his minority, specially alluding to such fact, is sufficient. Such a book constitutes a special minute-book. It is not necessary an entry should be made in the general minute-book. *Ib.*

4. State courts have general power to amend their records, both at common law and under the United States statute. In exercising the power they act as United States courts. Record of admission to citizenship may therefore, if necessary, be amended by directing an entry in the minute-book of the fact of such admission *nunc pro tunc*. *Ib.*

5. Act of 1870 (U. S.) July 14, against use, and possession with intent to use, of certificates, as to those issued prior to the act, applies to but four classes:—1. Certificates which are forged or counterfeit. 2. Certificates which, though genuine in all respects, and issued pursuant to the direction of the court, were procured by or for the appli-

cants therein named, by means of some imposition or fraud practised on the court. 3. Certificates issued by the clerk or other officer of the court, without lawful authority, in cases in which there was no appearance and hearing of the applicant in court. 4. Certificates issued to a person other than the one who uses or attempts to use it. *Ib.*

6. A claim by supervisor-in-chief of elections (R. S. U. S. §§ 2,002 to 2,081, 5,424 to 5,429), that a certificate of an admission to citizenship by this court, issued by the clerk thereof, and the admission itself, are invalid, on the mere ground that as the clerk of the court did not write out an entry in the general minute-book of the court reciting the proceedings, and showing the adjudication made, there is no legal record of the judgment of admission, and that consequently the person to whom such certificate was issued would be subject to criminal prosecution if he should attempt to vote, is untenable and unwarranted. *Ib.*

NEGLIGENCE.

1. Negligence and contributory negligence are necessarily relative as to time, place, person, and surrounding circumstances. They are questions of fact, and whenever either of them is to be determined upon conflicting evidence, it should be submitted to and determined by a jury. But when the evidence is not only undisputed, but the facts are clear and convincing, and admit of but one conclusion, it is the right and duty of the court to decide, as matter of law, whether the ultimate fact involved therein, namely, the existence of negligence or contributory negligence, has or has not been sufficiently proven. *Buckley v. Harlem R. R. Co.*, 187.

2. The fact that a vehicle is being unnecessarily driven on the track, does not of itself constitute contributory negligence, nor is it a fact to be taken into consideration in determining the question of contributory negligence; nor does it require the driver of the vehicle to use greater care and diligence and keep a better lookout than he would otherwise be bound to. *Adolph v. Cent. Park, &c. R. R. Co.*, 199.

See MASTER AND SERVANT; RAILROADS, 1-4; WAREHOUSEMEN.

NEW TRIAL.

1. Admissions by parties since trial are not sufficient ground for new trial, on ground of newly-discovered evidence, when the same are fully met. Facts discovered since trial are not sufficient, when it appears that such facts do not necessarily bear upon the issues involved. *Fowler v. Kelly*, 380.

2. General rule is that when defendant has omitted to move for a non-suit, or the direction of a verdict, on the ground of insufficiency of plaintiff's proof, and has treated the case as one calling for submission to the jury, he cannot, in support of a motion for a new trial, be allowed to claim either that the evidence is so insufficient on plaintiff's side, or so overwhelmingly prepondering as to authorize but one verdict,—viz., one in his favor. In the case at bar the rule was relaxed by reason of its being a highly peculiar case, and the preponderance in the number of witnesses so largely in appellant's favor. *Cohn v. Goldman*, 436.

See APPEAL, 2-5; COSTS, 3, 4; COURTS, 1.

NEW YORK CITY.

1. Where lands are taken

streets under act of 1813, the abutting owners have no exclusive right or interest therein, and no easement in the nature of a right of way over the same, other than that which is held and enjoyed by the public at large. Abutting owners, as such, have no special and peculiar interest in the enforcement of trusts created by the act of 1813. *Sixth Ave. R. R. Co. v. Gilbert El. R. R. Co.*, 292.

2. In case of award for damages under chapter 52 of the *Laws of 1852*, for changing grade of streets made to a certain named person by the board of assessors, and deposited by the comptroller with the city chamberlain, a claimant, in opposition to the person named in the assessment list as entitled thereto, has the remedy of an action against the party named in the assessment list for the recovery of a sum equal to the amount so deposited. The statute makes such deposit equal to a payment to the person named in the assessment list, for the purposes of a suit to be brought thereon. This right to bring action enures to every person seeking to enforce a claim to the award, no matter whether his alleged rights accrued before or after the making of the award, by operation of law or the act of the parties. *Hatch v. Bowes*, 426.

NOTARIES PUBLIC.

See **BILLS NOTES, AND CHECKS**, 6, 7.

NOTICE.

See **CONTEMPT**, 3.

NUISANCE.

The mere occupation by defendant's road of certain streets and avenues in the manner authorized by law, is not a public nuisance. *Sixth Ave. R. Co. v. Gilbert El. R. R. Co.* 292.

OBJECTIONS.

See **APPEAL**, 7; **TRIAL**, 8.

OFFICERS.

See **CONTEMPT**; **PROCESS**; **STATUTES**, 2; **SURROGATES**.

ORDERS.

If papers not recited in an order were read on the motion, the defendant, before appealing from such order, should apply to the court to have the order amended in that respect. *Smith v. Smith*, 140.

PARTIES.

See **EVIDENCE**, 4.

PARTITION.

Practice in cases of partition, including interlocutory proceedings and final judgment. The decision of the general term in this case substantially approves of all the proceedings in the action in detail, to and including final judgment; and therefore, reference is made to the statement of the case, and the opinion of the court, for the numerous points involved therein. *Offinger v. De Wolf*, 144.

PARTNERSHIP.

1. In case of an accounting between partners, some having overdrawn and others underdrawn, as to each partner who has underdrawn, all the others are liable to him for their respective portions of the amount of the underdraft; and as to each partner who has overdrawn he is liable to all the others for their respective portions of such overdraft. Insolvency of overdrawing partners does not affect the application of above

- principles. *Butler v. Ballard*, 191.
2. An agreement entered into between one partner in a firm and a third person, whereby the third person is to receive a certain proportion of such partner's share in the profits of the firm, and pay to such partner a corresponding proportion of the losses of the firm, constitutes a sub-partnership, and does not make the third person a partner in the firm, either *inter sese* or *quoad* other parties. *Burnett v. Snyder*, 238.
 3. The insertion in such an agreement of a clause "that it is hereby agreed, by and between the parties hereto, that A. B. (the third party) is a copartner in the firm of ———, this day formed," will not, if the agreement is entered into without the knowledge and consent of the other partners, make the third party a partner in the firm, either *inter sese* or *quoad* other parties. *Id.*
 4. One who becomes a joint owner with a partner of his share in a partnership standing in his name alone, with the knowledge and consent of all the members of the firm, is liable as a partner. *Id.*
 5. *Laws of 1833*, ch. 281, as to use of fictitious names, must be construed in connection with ch. 400, *Laws of 1854*, and ch. 144, *Laws of 1863*. A. lent the use of his name to a firm composed of B. and C., and the firm thereafter carried on business in the firm name of A. & Co. until 1866, when the business ceased, and the proceeds of the assets thereof belonging to B., passed into the hands of A. for management. A separate account, under the title of "A. & Co. of 1866," was kept of those proceeds, to distinguish them from the assets of a firm of "A. & Co." subsequently formed. It

seems that a transaction had with D. under the title of "A. & Co. of 1866," whereby B's money was loaned to D., the check to D. being signed "A. & Co. of 1866," B. being then deceased, does not fall within the prohibition of the statute, there being no proof that the provisions of the enabling statutes, under which the use of a copartnership name may be continued, had not been complied with. When invoking benefit of statute, it is necessary: 1. By plaintiff, the action must be based on the statute. 2. By defendant, the defense must be based on the statute. *Hennequin v. Butterfield*, 411.

PARTY WALL.

1. A party wall standing equally upon the land of adjoining proprietors, and whose central line is throughout coincident with the line of division between their respective premises, constitutes no incumbrance upon or defect in the title of either, such as will relieve a purchaser from his contract, or entitle him to compensation, notwithstanding that the owner may have covenanted with him to convey by good title in fee simple, free of incumbrance (*Hendricks v. Stark*, 37 *N. Y.* 106). But a party wall, as in this case, wholly on one of two contiguous lots of land, yet subject to appropriation and use for all the purposes of a party wall by the proprietor of the other, whether for a term or in perpetuity, and whether the privilege was given by grant, as in this case, or by license, covenant, or prescription, constitutes an incumbrance upon, or a defect in the title of the lot on which it stands (*Giles v. Dugro*, 1 *Duer*, 331). *Mohr v. Parmelee*, 320.
2. When the title is so incumbered

by reason of the prior grant of such an easement, a right of action immediately accrues on the covenant against incumbrances, by reason of the breach thereof. Whether the covenantee had or had not notice or knowledge of the existence of the incumbrances, is immaterial to his right of action, or to the question of damages. *Ib.*

8. More than nominal damages may be recovered in such case. The rule as to damages laid down in *Giles v. Dugro* (*supra*), approved. *Ib.*

PAYMENT.

1. After the original creditor has assigned the debt, the debtor is no longer indebted him; therefore, a payment thereafter made by such debtor to a sheriff holding an execution issued on a judgment recovered against his original creditor, does not fall within the provisions of section 193 of the Code of Procedure, and is not a discharge of the debt. This, although he had no notice of the assignment before such payment. *Adams v. Welsh*, 52.
2. Payment on the faith of letters of administration void for want of jurisdiction, to the person thereby undertaking to be appointed administrator, of a debt due to, or money of, the alleged deceased, will not protect the party so paying, against an action brought therefor by the alleged deceased, he being in fact still in life. *Roderigas v. East River Savings Inst.*, 217.

See ACCORD AND SATISFACTION; EXECUTION, 8; LETTERS TESTAMENTARY, 4.

PLEADING.

1. In an action brought by the lessors against the lessee of certain premises for one quarter's

rent, the lessee, defendant, alleged in his answer that the plaintiffs, with the intent of inducing defendant to accept the lease, declared, or falsely represented to the defendant, that the plaintiffs' lease of the premises expired May 1, 1876, whereas they well knew their lease expired February 1, 1876; that defendant accepted the lease relying upon these representations, which were made by plaintiff with intent to defraud defendant into accepting this lease; that defendant went to great expense, &c., and was obliged to move out of the premises February 1, 1876, and rent a new store at an advanced rent, at great expense and loss of custom, to his damage, &c.,—*Held*, that this defense was insufficient as a bar to the plaintiffs' claim; that the question of fraud was not raised, as there was no allegation that defendants were deceived by the alleged fraudulent representations; that such allegation cannot be supplied by inference or presumption (*Lefler v. Field*, 51 N. Y. 621); that the defense is also insufficient in not alleging that defendant was obliged to move, &c., on account of the alleged fraudulent representations, and in omitting to allege any damage therefrom. *Simmons v. Keyser*, 131.

2. The above allegations were designated in defendant's answer "a first defense." *Held*, that the defendant could not afterwards be allowed to insist that they constituted a counter-claim, and thus mislead his opponent, there being an omission in the answer to intimate in any way that the defendant intended so to do (*Bates v. Rosecrans*, 87 N. Y. 412). *Ib.*
3. Where the complaint alleges a fraudulent hypothecation of the instrument by some of the defendants to a copartnership con-

sisting of other of the defendants, for money theretofore loaned by said copartnership to the former defendants, and also alleges that if such copartnership bought the instrument, or advanced thereon any moneys in good faith and without notice of plaintiffs' ownership, yet it had sufficient other property held by it as collateral security to pay their claims and demands; and prays that the said copartnership deliver the instruments to the plaintiffs with all damages sustained by the conversion thereof, or if they shall have advanced any moneys thereon in good faith and without notice, then that they be allowed the amount thereof; and if they shall hold the securities in good faith, then that they account for the property held by them and received from the former defendants, and after deducting their claims and demands, pay to plaintiffs the surplus or so much as might be necessary to satisfy plaintiffs' claims, demands and damages against the former defendants,—*Held*, under denials of the above stated allegations in the complaint, evidence to show the transaction referred to was not with the copartnership, but with one of its members individually, and that he was in fact a bona fide holder for value without notice, was admissible. *Hennequin v. Butterfield*, 411.

4. A complaint alleging generally that defendants "did in concert by connivance, conspiracy and combination, cheat and defraud plaintiffs out of" is a sufficient allegation of the fraud and conspiracy. *Cohn v. Goldman*, 436.
5. A plea of former recovery against one or more joint tortfeasors, whether in contract or in tort, to be good must also aver actual satisfaction. *Id.*

See **BILLS, NOTES AND CHECKS, 4;**
COUNTER-CLAIM.

PRACTICE.

See **APPEAL; BILLS, NOTES AND CHECKS, 4; CONTEMPT, 3; COSTS; DISCONTINUANCE; DIVORCE; EXECUTION, 4; NEW TRIAL; ORDERS; PARTITION; REFERENCE; SETTLEMENT OF CASE ON APPEAL; STAY OF PROCEEDINGS; STIPULATION.**

PRESUMPTIONS.

Corporations are entitled to the benefit of the rule which imputes innocence rather than wrong to the conduct of man. *Cheever v. Gilbert El. Ry. Co.* 478.

For presumption on appeal, as to effect of erroneous admission of incompetent and illegal evidence, see *Havemeyer v. Havemeyer*, 508.

Presumption as to negligence of warehousemen. See **WAREHOUSEMEN.**

See **CONTRACTS, 1; LEX FORI**

PROCESS.

Ministerial officers who are bound by law to execute process, are protected by it, even though issued without jurisdiction, when the subject-matter of the suit or proceeding is within the jurisdiction of the court issuing the process, and nothing appears on its face to show that the person was not also within it. But this protection is confined to ministerial officers. *Roderigas v. East R. Sav. Inst.*, 217.

QUESTIONS OF FACT AND QUESTIONS OF LAW.

See **NEGLIGENCE, 1; WAREHOUSEMEN, 3.**

RAILROADS.

1. A driver of a vehicle has equal rights with the cars to travel on the track. Neither has any su-

- periority of right in this respect. *Adolph v. Cent. Park, &c. R. R. Co.*, 199.
2. The duty of a driver of vehicle, approached in rear by car, is not to unnecessarily obstruct the cars in their due, regular and orderly passage over the track. As soon as he becomes aware that a car is approaching him from behind, he must use reasonable diligence, prudence and speed, to get off the track before the car reaches him. If he omits so to do, and the car comes in collision with him, he is chargeable with contributory negligence. To pay such attention to the approach of cars in the rear, as a man of ordinary prudence, care and intelligence, would, under similar circumstances, give, consistent with the other duties of looking ahead, and on both sides. He is not specifically called on to look out for vehicles approaching from behind; that is, to turn round and keep a lookout behind at all times. *Ib.*
 3. The rights of driver of car, in such case, are to pass without unnecessary obstruction over the track, in due, regular and ordinary course. It is his duty to keep such a distance behind a vehicle in front, and to keep his horses and car under such control, as that they will not collide with the vehicle when it attempts to get off the track. *Ib.*
 4. The fact that a vehicle is being unnecessarily driven on the track, does not of itself constitute contributory negligence, nor is it a fact to be taken into consideration in determining the question of contributory negligence; nor does it require the driver of the vehicle to use greater care and diligence and keep a better lookout than he would otherwise be bound to. *Ib.*
 5. Act or charter granting franchise to use a public highway for a particular purpose authorizes the appropriation of so much only as is requisite to carry into effect the design for which the power of appropriation was given, and this privilege is exhausted by the appropriation in fact of so much of the roadway as the exigences of such design actually required. *Sixth Ave. R. Co. v. Gilbert El. R. R. Co.*, 292.
 6. Impairing its value by the proximity of other property legitimately employed for the public use and benefit under the sanction and by the authority of a legislative enactment, cannot be said to be taking private property for public use in the exercise of the right of eminent domain. *E. g.*, the authorization of a railway parallel with, and competitive of, one already established. *Ib.*
 7. Authorizing a corporation to use for the public use and benefit such parts of a highway as have not been already appropriated by a corporation, under authority conferred on it, as actually required by it, the use authorized to be made by the former corporation being such as not to interfere materially with the use by the latter of the parts so appropriated by it, is not the taking of private property of the latter corporation. *Ib.*
 8. Authorizing a corporation to use for the purpose of a railroad for the public use and benefit streets opened in the city of New York under the act of 1813, or parts thereof, does not take away any property or right of property of the abutting owners in the streets. *Ib.*
 9. The mere occupation by defendant's road of certain streets and avenues in the manner authorized by law, is not a public nuisance. *Ib.*
 10. The implied prohibition against crossing Broadway does

not affect the right of a company having authority under the act to proceed with respect to any part or portion of its road not directly affected by it. In the case at bar, the only portion of defendant's route affected by the prohibition, are those included within the intersecting lines of Broadway. *Ib.*

11. In the case at bar the court, applying the above principles, held there was no ground to sustain the suit for injunction. No private property of the plaintiff having been attempted to be taken or interfered with by the acts complained, it could not be sustained on the ground of restraining the taking private property for public use until due compensation had been made or provided for. Defendant's structure, not being a public nuisance, it could not be maintained on the ground of restraining a public nuisance. The fact that defendant's proposed railroad would cause special damage and injury to plaintiff, is in this aspect immaterial. *Ib.*
12. As the want of authority to cross Broadway only affected those portions of defendant's route which are included within the intersecting lines of Broadway, and as in reference to these portions the elements of interest and irreparable injury were wanting, the suit could not be maintained on this ground. *Ib.*

RECEIPT.

Receipt purporting to be in full, and to be an absolute bar to all claims and demands, is subject to explanation, and does not conclude the party making the same, from proof of facts and circumstances showing that it was not in full, and that there were existing claims and demands unpaid, although not due at the time the receipt was given (*Ryan v. Ward*, 48 *N. Y.*

204 ; *Bliss v. Shwartz*, 65 *N. Y.* 444). *Churchill v. Bradley*, 170.

RECEIVERS.

1. Neglect or refusal to comply with the orders of the court, subjects a receiver to punishment by fine and imprisonment, for contempt. *Clark v. Bining*, 126.
2. The summary jurisdiction of the courts, under the common law, to punish a delinquent officer for disobedience to its lawful order, has not been restricted by statute. *Ib.*
3. It is sufficient if the party charged with contempt had reasonable notice of the application to punish him, and was served with copies of the affidavits upon which it was based. The law does not contemplate an idle ceremony in serving papers that have already been served, and which are in the possession of the party accused, and are referred to in the order to show cause, served on him (*Albany City Bank v. Schermerhorn*, 9 *Paige*, 375). *Ib.*
4. In this case an order had been entered directing the receiver of the assets of a partnership to pay a certain sum as allowance to one of the counsel in an action. Such order having been disregarded, a further order was granted, adjudging the receiver in contempt, and directing the payment of said amount as a fine, and in default thereof, imprisonment. Over a year having elapsed since the first order, and said sum not having been paid, the court granted the order appealed from (both of the previous orders being still in force), enjoining said receiver from collecting or receiving the moneys deposited in bank by him as such receiver, and restraining and enjoining the receiver of the said bank from paying said sum to the receiver herein, and di-

recting payment to said attorney. *Held*, a proper exercise of the power of the court (*People v. Rogers*, 2 *Paige*, 103; *Code of Civ. Pro.* § 1241). *Clark v. Bininger*, 344.

5. A receiver of all the rents and profits may be appointed in an action to have dower set off. In the following case, a prior decree in partition was held no objection to the appointment of such receiver. Such decree, having been made in 1867 (the dowress being a party defendant), and the sole plaintiff having after decree conveyed all her interest to the only co-defendant of the dowress, such co-defendant being the mother of the defendants in the dower suit (the plaintiff and co-defendant of the dowress in the partition being the sole owner or tenant in common of the fee in the property), and said mother of the defendants in the dower suit having died in 1872, leaving the defendants in the dower suit her heirs at law, and it not appearing that the partition action had ever been revived, or that the defendants in the dower suit had ever been made parties to the partition suit, or that the commissioners appointed by the decree to make partition, and to set off one-third to the dowress as and for her dower, had ever acted, presents no objection to the appointment of a receiver in the dower suit. *Egan v. Walsh*, 402.

RECITALS.

LETTERS TESTAMENTARY, &c., 3 ;
ORDERS.

REFERENCE.

An order of reference to ascertain the damage sustained by reason of an injunction, entered before judgment in the action, is made prematurely, and is a formal irregularity ; but that irregular-

ity is waived, when the order of reference is entered by the consent of parties (*Lawton v. Green*, 64 *N. Y.* 326). This irregularity is also waived when the order has been entered and proceedings taken upon the same, without objection, and with the acquiescence of all parties, as in the case at bar. *Roberts v. White*, 455.

See ATTORNEY AND CLIENT ;
DIVORCE.

RECORDS.

See NATURALIZATION LAWS.

REFORMATION OF WRITTEN INSTRUMENT.

See CONTRACTS, 5-7.

RELEASE.

A party entitled to alimony payable in installments, by order of the court, can release and discharge her claim therefor in full and in advance, for a stipulated sum ; and where such a release had been made, and subsequently the party making the same moved the court to set it aside, and on the hearing of the motion, no allegations were made of fraudulent practice, or artifice to induce the party to execute the release, nor facts appeared to impeach the honesty and good faith of the transaction, the court should deny the motion, and refuse to set aside the release. *Smith v. Smith*, 140.

RES ADJUDICATA.

In this case the plaintiffs sought to recover judgment against the defendant upon a promissory note made by the firm of Griffith & Wundram, upon the ground that defendant was a general partner of that firm. Defendant claims by his answer to have been only a special partner in

that firm, and to have been adjudged as such, in proceedings in bankruptcy against said firm in the U. S. district court, to which proceedings the plaintiffs were parties, and that they were bound by the said adjudication. *Held*, by the court, that the adjudication in the U. S. district court appears to embrace all the elements to sustain the defense of *res adjudicata*. The court was of competent jurisdiction, and the parties were before it to have their respective rights determined; they were actors and participants in the proceedings, and also in the administration and disposition of the property and assets affected by the decision of that court, and the same question sought to be raised and decided in this action was then and there determined, and under such circumstances it would be inconsistent with well-established rules, that the parties or their privies should be allowed to again litigate a subject matter which was or which could have been determined in the proceedings in the U. S. district court. The facts pleaded in defense are sufficient. The case of *Durant v. Abendroth* (reported in 41 *N. Y. Super. Ct. [9 J. & S.]* 53), wherein this court held that this defendant was a general partner in the firm of Griffith & Wundram, noticed and reviewed by the court. *Van Dolsen v. Abendroth*, 470.

REVISED STATUTES AND SESSION LAWS.

- R. S.* ch. 6, tit. 3, § 41. Claims against executors and administrators. *Keyser v. Kelly*, 22.
Laws 1852, ch. 52. Awards for changing grades of streets. See *Matter of Hatch*, 89.
Laws 1870, ch. 382, § 9. Appointment, removal, &c., attendants upon N. Y. city courts. See *Murray v. Mayor, &c.*, 164.

Laws 1850, ch. 201. Powers of surrogates' assistants. *Roderigas v. E. R. Sav. Inst.*, 217.

Laws 1848, ch. 40, § 24. Liability stockholders, manf. corporations. *Jagger Iron Co. v. Walker*, 275.

Laws 1818, ch. 86. Land for streets in N. Y. city. *Sixth Ave. R. Co., v. Gilbert El. R. R. Co.*, 292.

Laws 1875, ch. 606. Rapid transit act. See *Ib.*

2 *R. S.* (3rd Ed.) 196, § 10. Chattel mortgages, filing of. *Wray v. Fedderke*, 335.

3 *R. S.* (5th Ed.) 474, § 36. Entries in protest-book of notary. *Natl. Butchers', &c. Bk. v. De Groot*, 341.

Laws 1833, ch. 281; *Laws* 1854, ch. 400; and *Laws* 1863, ch. 144. Use of fictitious names in business, &c. *Hennequin v. Butterfield*, 411.

Laws 1852, ch. 52. Award for damages in changing grade of street in N. Y. city. *Hatch v. Bowes*, 426.

R. S. part 1, tit. 4, § 4. Prohibition against assignment by corporations of property or chose in action in payment of debt to officer thereof. *Cheever v. Gilbert El. Ry. Co.*, 478.

Laws 1838, ch. 257. Joint debtor act. *Ludington v. Bell*, 557.

RULES OF COURT.

Gen. Rule 56. *Dietz v. Farrish*, 87.

Gen. Rule 92. *Harding v. Harding*, 25.

SALES.

See *BROKERS*.

SETTLEMENT OF CASE ON APPEAL.

A case on appeal, settled by judge, will be assumed to have been settled in accordance with the judge's minutes. The evidence

furnished by such settlement as to the real fact preponderates over that of the affidavit of the counsel who tried the cause for the party making the case, to the effect that the proposed case embodied the fact as it occurred, and suggesting a cause which might have led to its having escaped the attention and notice both of the judge and stenographer. *Canzi v. Conner*, 569.

SHERIFF. .

See EXECUTION; PAYMENT, 1.

SLANDER AND LIBEL.

See LITERARY RIGHTS.

STATUTES.

1. The court, under chapter 52 of the laws of 1852, has no jurisdiction, upon petition, to determine a disputed title, and direct payment to one of the claimants. Such determination can only be due process of law, at least in this court. The authority given by the phrase "to be secured, disposed of, and improved as the superior court shall direct," is simply a supervisory one over the chamberlain, with respect to his custody, care, management, and investment of the fund while it is in his hands, and does not authorize its withdrawal from him. *Matter of Hatch*, 89.
2. Section 9 of chapter 382 of the laws of 1870,—which provides for the appointment and removal of attendants upon courts in the city and county of New York,—held to be nugatory and void, because in conflict with the prohibition contained in article 3, section 16, of the constitution,—which provides, that "no private or local bills, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title." The following cases,

cited in the opinion of the court, are decisions in regard to the same statute, to the same effect: *Brennan v. Mayor, &c.*, 47 *How. Pr.* 173; *Berrigan v. Mayor, &c.*, Common Pleas, 1875: *Blunt v. Mayor, &c.*, Common Pleas, 1876. *Murray v. Mayor, &c.*, 164.

STAY OF PROCEEDINGS.

In the case at bar the plaintiff recovered a judgment against the defendants for damages caused by the unlawful taking, &c., of plaintiff's property, under an attachment issued in an action, brought by the defendants, in the supreme court, in which action the complaint was dismissed and an appeal taken. Pending this appeal the present action in this court was commenced, resulting in the judgment above-mentioned, from which the defendants have appealed, and stayed execution by an undertaking. Since such judgment in this court, the supreme court at general term has reversed the judgment at circuit, and ordered a new trial, thus restoring the attachment. *Held*, a proper case for an order staying plaintiff's proceedings in the action in this court, until final judgment in the action in the supreme court. *Franklin v. Catlin*, 138.

STIPULATION.

Where a party enters into a stipulation for the purpose of obtaining that which he could not otherwise have procured, and thereby obtains it, he should not be relieved from it. *Rust v. Hauselt*, 571.

STREETS.

See EMINENT DOMAIN; FRANCHISE; NEW YORK CITY; NUISANCE.

SURROGATES.

1. The jurisdiction of surrogates of State of New York, to grant letters of administration, depends on the surrogate's judicial determination, made in a judicial inquiry before him, that death has occurred. *Roderigas v. East R. Savings Inst.*, 217.
2. Where the surrogate signed forms of letters of administration in blank, and left them in charge of a clerk, appointed by him, who, on application being made to him for letters, filled up a blank form of petition therefor, caused the petitioner to sign the same, and swear to the same before him, passed on the sufficiency of the evidence, and then filled up one of such blank forms of letters, and either himself, or by another clerk, affixed thereto the seal of the surrogate's court, and then delivered said form so signed in blank, so filled up, and so sealed, to the petitioner, upon the execution of the bond required by statute; the surrogate never having seen the petitioner, nor the petition, nor the blank form of letters after it had been filled out, and never having given any instructions as to said blank form so filled out, or as to the issuing letters on the estate of the person over whose estate said blank form so filled up purported to appoint an administrator; there is no such determination and inquiry. Such instrument so purporting to be letters of administration is void. *Ib.*
3. Recital of death of party upon whose estate the letters purport to issue, is not *prima facie* evidence of a fact on which jurisdiction rests, and is not the recital of a jurisdictional fact. *Ib.*
4. Judicial powers and functions cannot be delegated. The maxim *delegata potestas non potest delegari* applies. Surrogate therefore cannot delegate the power to in-

quire and determine as to death. *Ib.*

5. Act 1850, chapter 201, does not authorize the surrogate to delegate such power to his assistants, nor does it of itself confer such power on them. It merely confers on the surrogate's assistants the ministerial power of administering oaths, and does not confer an authority to make a judicial inquiry or render a judicial determination. *Ib.*
6. Surrogates' courts are courts of limited and special jurisdiction, and the party (other than a ministerial officer) relying on its orders or decrees, has the burden of proving the jurisdictional facts. *Ib.*

TAXES AND ASSESSMENTS.

In the present case the plaintiff, the tenant of certain premises upon which an assessment had been laid, not having received notice to pay, and not being himself the person assessed or liable to have his goods levied upon, and being under no legal obligation towards his landlord to pay this assessment, void upon its face, apparently without the knowledge or request of his landlord, for the purpose of obtaining a loan by mortgage upon his lease, voluntarily and without protest or inquiry, paid the same. At the time of said payment, proceedings to vacate the assessment were pending on the part of the landlord without the tenant's knowledge, and the same was vacated subsequent to the payment thereof by the tenant. *Held*, that the tenant could not recover the moneys so paid by him; that the present case differs from *Peyser v. Mayor*, recently decided in the court of appeals, reversing the decision of the general term, 8 *Hun*, 418. *Pursell v. Mayor, &c.*, 348.

See NEW YORK CITY, 2.

TITLE.

See PARTY WALLS, 1, 2.

TORTS.

See AGENCY, 4; CONSPIRACY; CON-
VERSION; NEGLIGENCE;
PLEADING, 4, 5.

TRIAL.

1. In a case where no motion was made for the dismissal of the complaint, nor for the direction of a verdict, but the case was treated on the part of the defense throughout as one which could be disposed of by a jury only, and it not appearing from the evidence how the case could have been taken from the jury, the judgment should not be disturbed on the ground that the verdict was against the weight of evidence. *McMahon v. Walsh*, 36.
2. When the right of action or the defense is founded on a negative allegation, the party alleging the negative must establish it. *E. g.*, a vendor of real estate sued to recover the consideration agreed to be paid by the vendee, alleging that the vendee agreed to pay \$80,000, deducting therefrom all existing mortgages, liens and incumbrances on the property at the date of the deed; and alleged that the property was subject, at the date of the deed, to incumbrances amounting to \$24,000; and that the vendee had paid \$500. The action was brought to recover the balance of \$5,500. —*Held*, 1. It devolved on the plaintiff to prove the amount of the incumbrances. 2. It being admitted in the contract that there were liens, proof that there were certain liens was not sufficient to establish that there were no others. In such case plaintiff cannot rest on a presumption that in the absence of the existence of liens, it will be assumed

that there are none. In such case, the rule which casts on a party the burden of proving such facts as are more peculiarly in his knowledge than in that of the other, does not apply. *Algie v. Wood*, 46.

3. In this case, an objection was made to a preliminary question as to whether the witness had any conversation with a party in regard to the subject-matter of the action. The court ruled that the question might be answered, in view of further evidence being given in regard to certain facts in the inquiry of which this question was preliminary, at the same time ruling, that if certain other facts were sought to be proved, they would be ruled out. This question was answered simply in the affirmative. The subsequent questions and answers were not objected to by the party objecting to the preliminary question, nor did he move to strike out the evidence thus received, or move the court to direct the jury to disregard the same, although the subsequent evidence should have been ruled out if objected to, or should have been stricken out, or the jury directed to disregard it, by the court, if such a motion had been made. This evidence was clearly of that character, which the court had intimated in its ruling on the first objection, if objected to would be ruled out. *Held*, that the court ruled correctly in the first instance. By not objecting, in any form, to the reception of the subsequent evidence, the party precluded himself from subsequently claiming (on the appeal) that such evidence erroneously received. *Carr Mayor, &c.*, 158.
4. General exception to refusal to charge raises nothing for appellate court to act upon. *Held*, of an exception in form: "I also except to y

honor's refusal to charge our requests." *Daly v. Byrne*, 261.

5. The charge, as delivered, fairly submitted to the jury all the questions of fact which were presented for determination, and no exception was taken, and, afterwards, the court refused to charge specifically as requested by counsel.—*Held*, that there was no error in this refusal, because although the charge, as given, failed to adopt the precise language of the propositions to charge, so requested, yet they were substantially embodied in the charge as delivered. *Carr v. Mayor, &c.*, 158.

6. Where there is a conflict of evidence as to the fact of a broker's employment, and also in regard to the sale of the property having been effected through his agency and the case was properly submitted to a jury: for that reason the verdict cannot be disturbed. The court held in this case that the withdrawal of the question of the sale of the property having been effected through the agency of the plaintiff, from the consideration of the jury, by the direction of a verdict for the defendant, and its consequent determination as matter of law by the court, would have been error. *Lamson v. Main*, 24.

See APPEAL, 7-13 ; BROKERS, 2.

TRUSTS.

A trustee of an express trust can bring and maintain an action based upon a contract executed by him in that capacity. *Arosemina v. Hinckley*, 43.

U. S. LAW.

See NATURALIZATION LAWS.

ULTRA VIRES.

See CORPORATIONS, 5.

WAGERS.

See BROKERS, 1.

WAIVER.

See ARREST, 4 ; CONSPIRACIES, 2 ; EXECUTION, 4 ; REFERENCE.

WAREHOUSEMEN.

1. The rule is well settled that upon proof of the non-delivery of goods stored with a warehouseman, a presumption of negligence arises, and the burden of proof lies with the warehouseman to account for the loss, and to show that it was not caused by want of proper care and diligence on his part. *Clafin v. Meyer*, 1.
2. A larceny of goods occurring in consequence of neglect of warehouseman constitutes a conversion by virtue of a wrongful taking, and no demand by the owner is necessary after notification to warehouseman of loss of the goods. The fact that the goods stolen were from a U. S. bonded warehouse, and were bonded goods, does not change or affect defendant's liability *Ib.*
3. The non-delivery of property on demand raises a presumption of negligence, which the warehouseman is bound to remove by proof showing that sufficient ordinary care has been bestowed by him upon the property, and to establish such care the proof should show affirmatively that the loss, however it may have occurred, was not caused by want of proper care and diligence on his part. If the proof comes fully up to this requirement, the question of negligence becomes a question of law, and may be determined as such. But if, in such case, the fair and legitimate inference from the evidence is favorable to plaintiff's cause of action, or they

present a case where reasonable minds might differ as to the inference to be drawn from the evidence, the question is one of fact and must be determined as such. *Fairfax v. N. Y. C. & H. R. R. Co.*, 18.

Liability, &c., of warehousemen, see *Abecasis v. Gray*, 573.

WITNESS.

Plaintiffs' case, in the main, depended on the evidence of H., who testified to a conspiracy between him and G. to defraud

the plaintiffs, and to the accomplishment of the fraud alleged in the complaint. He was contradicted by G., and in essential particulars, by at least half a dozen witnesses, in such a manner that if he told the truth, they willfully perjured themselves. He, however, was corroborated to a large degree by facts and circumstances. *Held*, a verdict for plaintiffs should not be disturbed. *Cohn v. Goldman*, 486.

EVIDENCE, 5.

E. P. W.

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